AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-one, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

224 I.A. 621

BE IT REMEMBERED, that afterwards, to-wit: on FEB 23 1922 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

AT A TERM OF THE APPELLATE COURT

begun and held at Ottawa, on Tuesday, the fourth day of October,

in the year of our Lord one thousand nine hundred and

twenty-one, within and for the Second District of the State

of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

JUSTUS L. JOHNSON, Clerk.

CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures

following, to-wit:

Caroline Hosfeldt, appellee,)
vs.) Appeal from Rock Island.
Julius B. Schmidt, et al.,)
appellants,)

DIBELL, P.J.

224 I.A. 621

This was an action on the case, brought in the Rock Island circuit court on December 20, 1917, against the members of the firm of Fritz T. Schmidt & Sons and the Illinois Oil Company, wherein the declaration in different counts charged that Howard Hosfeldt, son of plaintiff, was able to and did provide a maintenance for plaintiff; that the Schmidt firm kept a dram shop in Rock Island and sold and gave to her son Howard, whiskey, beer, wine and other intoxicating liquor, whereby he became intoxicated and on account thereof became despondent and took his own life; and that the Illinois Oil Company owned the premises occupied by the Schmidt firm and where liquor was sold to Howard and permitted the occupation of said premises for said purposes and that by the death of Howard, plaintiff was injured in her property and means of support by means of said intoxication, so produced as aforesaid. These allegations were varied in the different counts. There were pleas of not guilty; a jury trial; a plea of the Statute of Limitations to certain amendments to the declaration; demurrer to said plea sustained; a verdict for plaintiff for $3,000, a motion by defendants for a new trial denied; a judgment on the verdict, and an appeal by defendants to this court.

The case sought to be established by plaintiff's proofs was that Howard, son of plaintiff, and a friend of his named Green, were bell boys working in the Blackhawk Hotel in Davenport, Iowa, while his parents lived in Rock Island County, Illinois, that Howard was between 17 and 18 years old; that the boys wished to buy and drink some liquor, and Howard told Green that he knew a place in Rock Island where they could get liquors cheaper at

Caroline Hoefelt, appellee,
vs.
Julius B. Schmidt, et al.,
appellants.

Appeal from Rock Island.

DIBELL, P.J.

This was an action on the case, brought in the Rock Island circuit court on December 20, 1917, against the members of the firm of Fritz T. Schmidt & Sons and the Illinois Oil Company, wherein the declaration in different counts charged that Howard Hoefelt, son of plaintiff, was able to and did provide a maintenance for plaintiff; that the Schmidt firm kept a dram shop in Rock Island and sold and gave to her son Howard, whiskey, beer, wine and other intoxicating liquor, whereby he became intoxicated and on account thereof became demented and took his own life; and that the Illinois Oil Company owned the premises occupied by the Schmidt firm and where liquor was sold to Howard and permitted the occupation of said premises for said purposes and that by the death of Howard, plaintiff was injured in her property and means of support by means of said intoxication, as produced as aforesaid. These allegations were varied in the different counts. There were pleas of not guilty; a jury trial; a plea of the statute of limitations to certain amendments to the declaration; demurrer to said plea sustained; a verdict for plaintiff for $3,000, a motion by defendants for a new trial denied; a judgment on the verdict, and an appeal by defendants to this court.

The case sought to be established by plaintiff's proofs was that Howard, son of plaintiff, and a friend of his named Green, were hell boys working in the Blackhawk Hotel in Davenport, Iowa, while his parents lived in Rock Island County, Illinois, that Howard was between 17 and 18 years old; that the boys wished to buy and drink some liquor, and Howard told Green that he knew a place in Rock Island where they could get liquors cheaper at

wholesale; that the two boys took a satchel and went to the place of business of the Schmidt firm and there bought whiskey, beer and wine, and placed the liquor in the satchel and brought it back to Davenport and took it to the home of an acquaintance named Strohuber, and there Howard drank whiskey and beer and wine and became intoxicated; that they went out into the street; that Howard threw loose change about the street and sang on the street and got into a fight with a police officer in plain clothes and was arrested and taken to a police station; that he resisted all the way; that he attempted to hang himself in the city jail; that he was drunk and violent and stubborn while there; that he explained his attempt to hang himself by saying that he did not care to live, that he had disgraced his family and for that reason would like to have finished the job; that in half an hour or an hour afterwards he was removed to the county jail and in half an hour afterwards was found hanging by the bars dead.

It is contended by appellants that as the drinking, intoxication and death all occurred in Iowa, no recovery therefor can be had in this State. There is nothing in our Dram Shop Act creating such a limitation upon the right to recover. The violation of the law by the defendants was the sale of liquor to this minor in Rock Island. That is the cause of action and not merely the death. We think the objection not well taken.

It appeared that plaintiff had a husband with whom she was living. It is argued that he was bound to support plaintiff and therefore the proof does not show that she was injured in her means of support by the death of her son. The proof showed that for several years Howard had been working for different employers; that at several places where he worked he was paid $4.00 per day and plaintiff received all his wages; that while working at another place where he received from $3.00 to $5.00 per day, he sent his mother from $7.00 to $10.00 per week; that when he worked at the Blackhawk, he gave his mother $7.00 to $10.00 per week; that when

he worked at another place he turned over a bank account to her on which she drew out $100.00 at different times. As to this latter payment it was shown by defendants that she was mistaken in the amount. It therefore appeared that he was delivering to his mother a substantial portion of his earnings from the time he first began to work, and it was shown that nearly all of that time he did not live at home. We think it was not necessary for plaintiff to prove what support she received from her husband or what he was able to do for her, but that this evidence was sufficient to show that she was injured in her means of support by the death of her son. There was a similar holding in Threlkeeb v. Morwodowski, 202 Ill. App. 599, though the judgment in favor of the mother was reversed for errors in instructions.

It is contended that the declaration did not sufficiently identify the place where the liquor was sold. It will be a sufficient answer to this contention to say that the abstract only partially states the description of the premises in the declaration and does not at all set out that portion of the description of which complaint is made in the briefs. So far as the abstract is concerned, the only description of the premises where the liquor was sold to Howard was No. 1517 Second Avenue, in the City of Rock Island, in the County of Rock Island and State of Illinois. That was a perfect description of the place where it was proved that this liquor was sold. It seems that there was some other description not stated in the abstract of the declaration, which had to do with a certain Lot 4 and the City Engineer of the City of Rock Island testified that the building in question was not wholly on said Lot Four. We are of the opinion that the description of the location of the building by the street and number was sufficient. Green, a witness for plaintiff, was the only one who told where this liquor was purchased. He had stated that he did not remember the description of the place but that he could go to it and he did take counsel for plaintiff to the place on two

occasions and pointed out this particular store, No. 1517 Second Avenue, which was owned by the Illinois Oil Company and occupied by the Schmidt firm for a wholesale liquor house. Green testified that they bought the liquor over a counter, and defendants proved that there was no counter in the building. They did prove that there were two saloons adjoining this building. All these matters went to the question whether Green was correct in his identification of No. 1517 as the place where the liquor was bought. That was a question for the jury. We cannot say they were wrong. There was another matter affecting the credibility of Green. He was a witness before the coroner's jury, which investigated the cause of this death, and at first he there denied that he went with Howard to buy these liquors. Before his testimony was through, his employer at the Blackhawk ascertained the truth from him and he then again became a witness before the coroner'sjury and testified as he testified at the trial of this case. Nevertheless the jury believed him. Green testified by deposition and plaintiff is criticized for not producing him in person at the trial. Green lived in another state and plaintiff could not compel his attendance in this state, and the plaintiff was not only justified but required by due diligence to take his deposition while she could locate him. It is claimed the damages are excessive. The courts of review in this State have sustained awards of damages larger than the verdict of this jury in similar cases of the death of children under age. We cannot say that this son, who seems to have been very kind to his mother in giving her his wages, would not in time have paid her more than the amount of this verdict. We think the damages are not excessive.

Complaint is made of the first instruction given at plaintiff's request. It simply contains a quotation from the Dram Shop Act. That quotation does contain the expression that a party damaged can recover for exemplary damages. Another

[illegible]

instruction given for defendant permitted a recovery for plaintiff only for damage to her means of support. A similar situation existed in Jeffries v. Alexander, 266 Ill. 40, where an instruction contained the same quotation from the statute and there were other instructions which limited the recovery to the means of support of plaintiff, and it was held no error was committed in that case by giving that instruction. Several instructions requested by defendant were refused. So far as they contained correct propositions of law they were embodied in other instructions given. The rest of them embodied incorrect elements. The court is not required to give the same proposition of law in several instructions. We are of opinion there was no reversible error in the ruling of the court upon the instructions.

Upon the motion for a new trial the defendants presented an affidavit by one Clara Strohuber, who was the wife in the home where the plaintiff's proof showed that Howard and Green spent the afternnon of the day of his death, and the substance of her testimony was that Howard did not go over to Davenport with Green, but that he stayed at her home in Davenport while Green went away with a suit case and came back an hour and half or two hours later with whiskey and wine in said suit case, and that Howard drank wine only and no whiskey at her home that afternoon. With this was an affidavit of one of the defendants, seeking to excuse defendants for not producing Mrs. Strohuber at the trial. It therefrom appears that Charles Strohuber, the husband of Clara Strohuber, was asked in behalf of defendants if his wife knew anything about the case and was told that she did not. This was a long time before the trial. Defendants could have found Mrs. Strohuber then. Ordinary diligence should have caused them to inquire of Mrs. Strohuber what she knew about these facts and not to rely upon what her husband said about it. It was very obvious that Mrs. Strohuber would be likely to know whether these boys

instruction given for defendant omitted a necessary ele-ment that the damage be not remote or imperfect. A similar situa-tion existed in Watkins v. [illegible], 253 Ill. 63, where the instruction contained the same omission that this one did, there were other instructions which limited the recovery to the amount of damages to plaintiff, and it was held no error committed in that case by giving that instruction. Certain instructions requested by defendant were refused. If they contained correct propositions of law they were embodied in other instructions given, the rest of them embodied [illegible] elements. The court is not required to give the same proposition of law in several instructions. We are of opinion there was no reversible error in the ruling of the court upon the instructions.

From the motion for a new trial [illegible] affidavit by one [illegible] Strohmeier, who was the wife in the lease [illegible] the plaintiff [illegible] the [illegible] of the [illegible] [illegible] that she stayed at her home in [illegible] while [illegible] was, with a suit once and came back [illegible] later with [illegible] and wife in said suit once, [illegible] that [illegible], and no [illegible] at her home that [illegible]. [illegible] this was an affidavit of one of the defendants, [illegible] defendant for not producing Mrs. Strohmeier at the trial. It therefore appears that Charles Strohmeier, the husband of Mrs. Strohmeier, was asked in behalf of defendants if she knew anything about the case and was told that she did not. This was a long time before the trial. Defendants could have found Mrs. Strohmeier then. Ordinary diligence should have caused them to inquire of Mrs. Strohmeier what she knew about these deals and not to rely upon what her husband said about it. It was very obvious that Mrs. Strohmeier would be likely to know whether these boys

drank liquor in her house that afternoon. At that time they could have reached her and could have taken her deposition. Afterwards she and her husband removed to another city and defendants did not know where she was. After the trial they exercised the diligence which they should have exercised long before it. Defendants urge that if she had appeared and testified, plaintiff could not have recovered. We do not think that follows. If she had testified and had been cross examined, it might have been that the jury would still have believed Green. Her proposed testimony is not of the character which would require the granting of a new trial in view of the lack of diligence in ascertaining her knowledge of the facts.

The judgment is therefore affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-

Clerk of the Appellate Court.

6941 2126a

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-one, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

JUSTUS L. JOHNSON, Clerk.

CURT S. AYERS, Sheriff.

224 I.A. 621

BE IT REMEMBERED, that afterwards, to-wit: on the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

E. Godel & Sons, a corporation, appellee,

vs.

John Barton Payne, Agent, etc., appellant,

Appeal from Peoria

224 I.A. 621

DIBELL, P. J.

This is an action on the case, brought by E. Godel & Sons, a corporation, engaged in meat packing at Peoria, against the Director General of Railroads, operating the Chicago & Alton Railroad, and by amendment, against the agent of the United States to settle claims arising during the Federal operation of the Chicago & Alton Road. The alleged cause of action is the conversion of a car load of hams at East St. Louis, A declaration of five counts was filed by plaintiff, to which defendant filed the general issue and two special pleas. There was a jury trial and a verdict and a judgment for plaintiff for $1,100, and defendant appeals. Defendant alleges as ground for reversal, (1) that the railroad did not convert the carload of hams; (2) that, if it did, plaintiff by its subsequent conduct waived the conversion; (3) that the true measure of damages was not proven or applied; (4) that the court erred in rulings on instructions.

Armour & Company purchased of plaintiff through Chicago Board of Trade brokers a carload of hams to be delivered to the Armour Company at its plant at East St. Louis. The carload was inspected and the weighing supervised at the plant of plaintiff in Peoria. The hams were inspected on behalf of the Armour Company at Peoria and approved, and also by a United States inspector there and approved, and the car was shipped over the Chicago & Alton Railroad, consigned to the plaintiff, and the only information the railroad company had that Armour & Company were concerned in the shipment was the notation, "Notify Armour." Plaintiff

executed a sight draft on Armour & Company at East St. Louis for $8,848.31, and attached that draft to the bill of lading and deposited it in a bank in Peoria for collection. The bill of lading provided that the property should not be delivered without the surrender of the original bill of lading properly endorsed. The draft was never paid and the bill of lading was never surrendered, and it and the contents of the car were still the property of plaintiff, the consignee. When the car reached East St.Louis, the railroad company took the car off from its tracks and delivered it on the Armour tracks at Armour's plant at East St. Louis and placed it at the loading dock of Armour & Company, and an agent of Armour & Company requested the government officer to remove the seals of the car. The proof shows that such cars were placed on the Armour tracks after the Armour yard men had so directed. Inasmuch as the draft attached to the bill of lading had not been paid and the bill of lading had not been surrendered, the operator of the railroad company was not authorized to deliver this car to Armour & Company. We are satisfied from the evidence that he did so deliver the car in violation of the rights of the plaintiff. There was proof that the government inspector had had nothing to do with the contents of the car or with opening the same till directed by an agent of Armour & Company after the car had been placed at its dock on its tracks by defendant. Therefore the conversion was complete before the government inspector began his work. One difficulty which afterwards arose at East. St. Louis was that the East St. Louis house of Armour & Company had directed itsChicago office to purchase "New Cure" hams, whereas the code term received by the Chicago office of Armour & Company called for "Not New Cure" hams, which was what was purchased and shipped. The East St. Louis house supposed its order had been carried out as sent by it and that the contents of the car were not as agreed. This was a misunderstanding between the two houses of Armour & Company. The car having been delivered

[illegible] a right draft on Lamont & Company [illegible] for $3,048.21, and endorsed that draft to the bill of lading and deposited it in a bank in Omaha for collection. The bill of lading provided that the property should not be delivered without the surrender of the original bill of lading properly endorsed. The draft was never paid and the bill of lading was never surrendered, and it and the contents of the car were still the property of plaintiff, the consignee. When the car reached Des Moines, the railroad company took the car off from its tracks and delivered it at the loading dock of Lamont & Company, and an agent of Lamont & Company requested the government officer to remove the seals of the car. The proof shows that [illegible] directed. Inasmuch as the draft presented to the bill of lading had not been paid and the bill of lading had not been surrendered, the officers of the railroad company did not consider it safe to hand out to Lamont & Company. We are satisfied from the evidence that he did do delivery the car in violation of the rights of the plaintiff. There was proof that the government officers had nothing to do with the contents of the car or with [illegible] the bill directed by an agent of Lamont & Company. [illegible] the conversation [illegible] the government officer [illegible] at Omaha. It looks as if the draft [illegible] a [illegible] and already [illegible] Lamont & Company [illegible] was [illegible] and [illegible]. [illegible] of the [illegible] the [illegible]

to Armour & Company at East St. Louis in violation of the rights of plaintiff, the consignee, the defendant became liable for the results. 10 C.J. 262.

An officer of plaintiff went to East St. Louis on being notified of the situation. The main part of the hams were in proper condition, but some of them were not. Plaintiff's foreman caused certain things to be done to restore some of the unfit hams, and to save others from being a total loss, and had some transactions with the Armour employes concerning it. Defendant claims that thereby plaintiff waived the conversion. We are of opinion that what plaintiff then did was in obedience to the rule which requires the injured party under such circumstances to do what he can to diminish the damages, and that plaintiff did not thereby waive the previous unlawful conversion.

Defendant contends that the damages were to be measured by the value of the property at East St. Louis where the conversion took place, and that such value was not proven. The bill of lading which covered this shipment contained the following provisions: "The amount of any loss or damage for which any carrier is liable, shall be computed on the basis of the value of the property at the place and time of shipment under this bill of lading, including the freight charges, if paid." The place of shipment was Peoria, and under this contract the court properly admitted the value of the hams at Peoria, and that was proven and is controlling. 10 C.J. 388. But, further, the presumption is that the value of goods at the place where they were to be delivered is as much as or greater than at the place of shipment, in the absence of any proof to the contrary. Rome R.R. Co. v. Sloan, 39 Ga. 636. It is also true that the price paid in the regular course of business is a sufficient basis to measure the damages at the place of delivery, since sale in the market is evidence of market value. Euston v. Erie R.R. Co. 147 Ill. App. 594, 600.

[illegible] & Company at East St. Louis in violation of the rights of plaintiff, the consignee, the defendant became liable for the results. 10 C.J. 38[illegible].

An officer of plaintiff went to East St. Louis on being notified of the situation. The major part of the hams was in proper condition, and some of them were not. Plaintiff's [illegible] [illegible] in things to be done to restore some of the [illegible], and to save others from being a total loss, and had some [illegible] tions with the [illegible] [illegible]. Defendant claims that thereby plaintiff waived the conversion. [illegible] that what plaintiff then did was in obedience to the rule which requires the injured party, under such circumstances, to do what he can to diminish the damages, and that plaintiff did not thereby waive the previous and final conversion.

Defendant contends that the damages must be determined by the value of the property at East St. Louis where the conversion took place, and that such value was not proven. The bill of lading which covered this shipment contained the following provisions: "The amount of any loss or damage for which any carrier is liable, shall be computed on the basis of the value of the property at the place and time of shipment under this bill of lading, including the freight charges, if paid." The [illegible] [illegible] [illegible] admitted the value of the hams at [illegible], and that [illegible] and is controlling. 10 C.J. 380. But, however, the presumption is that the value of goods at the place where they are to be delivered is as much as or greater than at the place of shipment, in the absence of any proof to the contrary. [illegible] Sloan, 39 Ga. 550. It is also true that the market price in the regular course of business is a sufficient basis to compute the damages at the place of delivery, since [illegible] is the best evidence of market value. [illegible] 594, 600.

Taking the market value of the goods at the place of shipment as the basis for computing the damages, as provided in the bill of lading, the evidence clearly establishes, we think, at least as large an amount as the verdict rendered by the jury. If we are correct in the view we have taken of the facts and the law, then defendant was not harmed by the rulings of the court upon the instructions.

The judgment is therefore affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

_____

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-one, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Mary Ann Short, Executrix, etc., appellee,	)	
vs.	)	Appeal from Peoria.
Chicago, Rock Island & Pacific Railway Company, appellant,	)	

224 I.A. 621

DIBELL, P.J.

Two tracks operated by the Chicago, Rock Island & Pacific Railway Company in the City of Peoria, run in a northerly and southerly direction, parallel with the Illinois River, and near the river bank. Sanger Street in said city runs in an easterly and westerly direction and crosses these tracks at right angles. The ground between the tracks and the river is lower than at the tracks. The ground at Sanger Street and near it east of the railroad is used for a dumping ground and the slope towards the river has gradually been filled up that way. The city maintains an employee to spread the refuse that is there dumped. On this bottom land and on the easterly embankment of the railroad are weeds and trees. On August 2, 1920, James L. Short conducted a store in said city and about once a week took garbage and refuse from his store upon a Ford truck and deposited such garbage upon the said dump and crossed the railway tracks at Sanger Street in coming and going. In the forenoon of August 2 he drove his Ford truck with several boxes or barrels of refuse over the Sanger Street crossing and upon the dump. After completing his dumping he turned around in a circle and came back on to the line of Sanger Street, and when on the west track, which was the south bound track, his car stopped. On said track a cut of freight cars were at that time being backed south and approaching Sanger Street crossing. One railroad employee was stationed on the car at the advancing end and another on the

car at the rear end of said cut of cars. The duty of the latter was to transmit to those in charge of the engine behind him any signals he might receive. The Ford truck was struck and carried some distance further south and thrown off the track and Short was killed. His widow, Mary Ann Short, was appointed Executrix of his estate, and brought this suit against the railway company for the benefit of the next of kin.

Each count of the declaration charged that the negligence of defendant therein charged caused the death of decedent. The first count contained a general charge of negligence in driving and managing the engine and cars. The second count charged that the train was being operated at a high and dangerous rate of speed. The third count charged that defendant failed to have a servant stationed on the advancing end of said cut of cars to keep a reasonably safe lookout to avoid injury and damage to life and property. The fourth count charged the facts concerning decedent's truck being stalled upon the crossing and that he was unable to start it and was in great danger of his life and that defendant in due time was fully appraised of such situation. The fifth count charged that defendant negligently permitted weeds and other vegetation to grow to such a height upon its right of way in close proximity to its tracks as to hinder the public in the use of said crossing. The sixth count charged that defendant failed to give any warning of the approach of said cut of cars to said crossing. The first additional count charged that there was in force in said city an ordinance limiting the speed of freight trains in said city to six miles per hour and averring that this cut of cars was running at a higher rate of speed than allowed by law. The sedond additional count charged a violation of an ordinance requiring the bell of a locomotive to be rung continuously while freight cars are in motion in said city. The plea was not guilty. Plaintiff had a verdict for $8000., and a judgment thereon, and defendant appeals.

There was much proof in support of nearly every count of the declaration and much proof tending to contradict the same. There was proof tending to show that these freight cars were being pushed down grade at a speed of 12 or 15 miles per hour and proof by defendant's witnesses that the speed did not exceed six miles per hour. There was proof that no locomotive bell was rung, or rather, that various persons in that vicinity did not hear it rung. The employe of defendant upon the head car did not hear it rung. The other trainmen testified it was rung. There was proof not disputed, that Short's automobile truck became stalled on the crossing and he apparently could not start it. There was proof that weeds and other vegetation grew upon the east side of the railroad right of way and upon the embankment, so high as to prevent persons on the dumping ground from seeing cars approaching from the north. There is other proof that such growth was small and low and wasnot a hindrance to sight. The company put in evidence a number of photographs taken that afternoon, some of which tend to show that such growth of weeds, etc., was slight. Defendant devotes most of its brief and argument to seeking to demonstrate that such vegetation on the right of way was not sufficiently high to hinder the view of an approaching train. But there is also much proof tending to show a violation of the ordinance as to speed and as to the ringing of a bell and as to a lack of any warning of the approach of said cars to that crossing. It appears that Short's truck did become stalled upon the crossing and it may be that the jury were justified in finding the speed of the cars to be 12 or 15 miles per hour and that if the speed had been limited to 6 miles per hour the peril of decedent when his truck became stalled on the crossing would have been discovered by defendant in time so that the cars could have been stopped before they reached him. Appellant says that the testimony introduced by the

There was much proof in support of [illegible] concerning the isolation and much proof was lacking to [illegible] the case. There was proof tending to show that three [illegible] [illegible] walked down [illegible] and on [illegible] [illegible] and proof by defendant's witnesses that the speed [illegible] six miles per hour. There was proof that [illegible] [illegible] was [illegible], or rubber, that [illegible] [illegible] [illegible] it rung. The employee of defendant [illegible] [illegible] it rung. The other [illegible] [illegible] There was proof not disputed, that [illegible] became stalled on the crossing and [illegible] it. There was proof that [illegible] the east side of the [illegible] light [illegible] [illegible], so high as to prevent persons on the [illegible] [illegible] seeing cars approaching from the north. [illegible] [illegible] night. [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] tation on the right of way [illegible] the view of an approaching train. [illegible] [illegible] to show a violation of the [illegible] to the ringing of a bell and [illegible] approach of a train [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] 12 or 15 miles an hour [illegible] [illegible] to 6 miles per hour the point of [illegible] [illegible] on the crossing would have [illegible] [illegible] that the cars could have [illegible] [illegible] that the [illegible]

plaintiff was clear and unadulterated perjury and unbelievable and impossible and that plaintiff's witnesses were "river rats." Yet the jury did believe them and the trial judge, who saw and heard the witnesses, approved their verdict for plaintiff. There is much evidence on each side of each disputed question of fact. Appellant treats the case as if the only cause of action which the proof fairly tends to establish grows out of the charge as to the existence of weeds and other vegetation on the railroad right of way. If that were the only charge it might be necessary to carefully scrutinize and consider the evidence on that subject. But in fact there is much evidence to support plaintiff's case on the other charges. We think it manifest that it would be impossible for this court to say that the jury erred in their findings upon these questions of fact and that another jury would be likely to decide them the other way.

It is not contended that the court erred in rulings upon the admission of evidence, except in permitting one witness to testify to the speed of the cars, and we are of opinion that a foundation was laid by plaintiff for the admission of that testimony. It is manifest that we cannot disturb the conclusions of the jury upon either the plaintiff's cause of action or the defendant's claim that decedent was not in the exercise of due care for his own safety.

Appellant complains of the court's refusal to give an instruction which it requested that it was not required by law to stop its train till decedent's automobile had passed over the crossing. That may be a correct general proposition, but it would have been misleading as applied to this case. This was not a regular train, but a switching operation. If those in charge of the cut of cars being pushed from one place to another see an automobile stalled on a street crossing directly ahead of them in time to stop, we are of opinion the court could

plaintiff was clear and unequivocal, [illegible]
and impossible and that plaintiff's witnesses [illegible]
Yet the jury did believe them and the trial judge, who [illegible]
heard the witnesses, approved their verdict for plaintiff.
There is much evidence on each side of such [illegible]
of fact. Accordingly the only [illegible]
action which the proof fairly tends to establish [illegible]
the charge as to the existence of [illegible]
the railroad right of way. If that was the only charge it
might be necessary to accordingly [illegible] the
evidence on that subject. But in that [illegible]
to support plaintiff's case of the other [illegible]
manifest that it would be impossible for the [illegible]
the jury erred in their findings [illegible]
and that another jury would [illegible]
[illegible].

It is not contended that the court [illegible]
the admission of evidence, except in [illegible]
to testify to the speed of the [illegible]
a foundation was laid by plaintiff for the [illegible]
testimony. It is manifest that [illegible]
clusions of the jury upon either the [illegible]
or the defendant's claim that [illegible]
of due care for his own safety.

Appellant complains of the [illegible]
instruction which it requested [illegible]
to stop the train till [illegible]
the crossing. That may be a correct [illegible]
it would have been misleading [illegible]
was not a regular train, but a [illegible]
in charge of the out of [illegible]
another saw an automobile [illegible]
ahead of them in time to stop, we are of opinion the court [illegible]

not tell the jury as a matter of law that the train of cars could proceed as if no such perilous condition existed ahead of them, but it would be a question of fact for the jury to determine whether in the exercise of ordinary care, the cars should have been stopped. Complaint is made that the instructions for plaintiff made too prominent the right to recover for loss to the means of support of the widow and sons, if they found from the evidence there was such loss when in fact the sons were of age and not living at home and were doing for themselves and one of them married. The widow clearly was injured in her means of support, and the jury in the trial of such a case had nothing to do with the distribution of the proceeds of the judgment by the administrator, but that is controlled by another court. United Breweries Co. v. O'Donnell, 221 Ill. 334. The court could not determine for the jury that the sons could not be injured in their means of support by the death of their father, and the instructions did not permit the jury to allow anything for the pecuniary loss to the sons, unless the evidence showed that there would be pecuniary loss to them. In any event, the widow was so injured. It is urged that the damages are excessive. Decedent was 51 years of age, in good health, and was making from $300.00 to $350.00 per month prior to his death. We are unable to say that the damages are excessive.

Judgment affirmed.

not tell the jury in a matter of law that the [illegible] could proceed as if no such pecuniary condition existed [illegible] of them, but it would be a question of fact for the jury to determine whether in the exercise of ordinary care, we [illegible] should have been stopped. Generally in such cases the instructions for plaintiff made too prominent the right to recover the loss to the means of support of the widow and [illegible], it was found from the evidence there was such loss that in [illegible] some were of age and not living at home [illegible] themselves and one of them married. The widow [illegible] in her means of support, and the jury in the trial of such a case had nothing to do with the determination of the [illegible] of the judgment by the [illegible], but that it [illegible] by another court. United [illegible] v. [illegible] 221 Ill. 384. The court could not determine for the jury that the sons would not be injured in their means of support by the death of their father, and the instructions did not permit the jury to allow anything for the pecuniary loss to the [illegible] loss the evidence showed that there would be [illegible] them. In any event, the widow was an injured [illegible] that the damages are excessive. [illegible] in good health, and was making from $900.00 [illegible] prior to his death. We are unable to [illegible] excessive.

[illegible]

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-

Clerk of the Appellate Court.

6957

2128

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-one, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

224 I.A. 621

BE IT REMEMBERED, that afterwards, to-wit: on the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Albertina Applequist, appellee,)
vs.) Appeal from Winnebago.
B. A. Knight, et al., appellants,)

224 I.A. 621

DIBELL, P. J.

This is a bill brought by Albertina Applequist against a trustee and others acting with him for a misappropriation of trust property. When the transactions here involved were begun, Swan Widell was a real estate operator in Rockford and the complainant was then his wife, Mrs. Albertina Widell, living with him in Rockford. Before the transactions were completed she obtained a divorce from Widell and left Rockford and lived in Waukegan and Chicago and at some time before the filing of this bill married again to one Applequist. There was a bill and an amended bill. Some of the defendants went out of the case on demurrer and as to one defendant who answered, the bill was dismissed for want of equity at the hearing. The defendants against whom a decree was rendered were the Manufacturers National Bank, E. D. Reynolds and B. A. Knight. They perfected separate appeals but have joined in one record and one assignment of errors thereon. No cross errors are assigned and therefore the dismissal of other defendants is not a matter for our consideration.

The main facts proven by complainant are not disputed. Mrs. Widell owned a tract of five acres known as Lot 6 of a certain addition to Rockford, and owned certain lots in Belvidere. Lot 6 was subject to a mortgage securing the principal sum of $1,500. and held by Knapp, Barnes & Co. Magnus Froburg entered into a contract to buy this property from Mrs. Widell. He made some payments but became much in arrears, and surrendered that contract and took a new contract from Mrs. Widell. He was to pay $4,000 for the property in small and frequent payments. Widell became

financially embarrassed. Widell owed the Manufacturers National Bank a considerable sum on two or three notes. Widell applied to the bank for another loan of $1,000. The bank required collateral security. It was disputed whether it required collateral secutity only for $1,000 or also for the previous loans then unpaid. The court decided that controversy in favor of the bank and that collateral security was required to secure all the loans to Widell. The officer of the bank to whom this application was made sent Widell to E. D. Reynolds, attorney for the bank, to determine how the instrument should be prepared. Widell and wife went to Reynolds and the conference resulted in Reynolds requiring and the Widells executing a deed to Reynolds of said lot 6, another deed to Reynolds of the Belvidere lots, and an assignment of the Froburg contract to the bank and the placing of the same in the bank, with authority in the bank to collect the payments as they matured and credit them on the Widell obligations. Thereafter Mrs. Widell filed a bill for divorce against her husband and a decree was granted her on September 2, 1916. Reynolds was her solicitor, and B. A. Knight was solicitor for Widell. Before the hearing of the divorce case was had Knight went to the office of Reynolds and there met Reynolds and Mrs. Widell and discussed the settlement of property rights in the event a divorce should be decreed, and it was then agreed that each party should retain all real estate which he or she then owned and that should be a settlement of their property rights. It is clear that they all understood that Mrs. Widell should retain said lot 6 and said Belvidere lots. Soon after the divorce Mrs. Widell left Rockford and resided elsewhere. Knight and Reynolds appear to testify to some conversation or conversations with her after the divorce was granted, but Mrs. Widell testifies that as soon as she got her decree she left and never afterwards saw Reynolds until after the bringing of this case. Within two weeks after the decree of divorce Knight had devised and carried out, with the assistance of Reynolds,

[illegible] immorally [illegible]. Widell used the [illegible]
Bank a considerable sum on the or there [illegible]. [illegible]
the bank for another loan of $1,000. The [illegible]
security. It was discovered whether [illegible]
[illegible] or else for the previous loan [illegible].
court decided that contrary to [illegible] of the [illegible]
[illegible] security was not [illegible] to [illegible]
The officer of the bank to whom this [illegible]
Widell to E. B. Campbell, attorney for the bank, to [illegible]
the [illegible] should be produced. Widell was [illegible]
and the [illegible] assisted in regards [illegible]
[illegible] to [illegible] of [illegible]
of the [illegible] lots, and [illegible] of the [illegible]
of the [illegible] and the [illegible] along of the [illegible] in the [illegible], [illegible]
[illegible] in the [illegible]
filed a bill for divorce against her husband [illegible]
[illegible] for on September 5, 1896. [illegible]
and E. A. Knight [illegible] solicitor for [illegible].
of the divorce [illegible] Widell [illegible]
and there not [illegible] and [illegible]
[illegible] of property rights in the court [illegible]
and it was then proved that [illegible]
[illegible] which he or she [illegible]
of their property rights. [illegible]
that [illegible]. Widell should [illegible]
[illegible] after the [illegible]
[illegible]. Knight and [illegible] [illegible]
[illegible] to [illegible]
[illegible]. Widell testifies that he [illegible]
and [illegible] affairs and [illegible]
this case. Widell has [illegible] [illegible]
[illegible] and divorced [illegible], [illegible] [illegible]

a complete change of the property situation. The contract with Froburg, which was in the bank and on which the bank had collected some payments, was surrendered to Froburg. Reynolds deeded lot 6 to Froburg. Knight procured from one J.H. Rapp a loan of money secured by two mortgages on said lot 6. The first was for $2,200 and Rapp was paid two per cent commission therefor, or $44. The second was for a little over $1,200 and Rapp was paid $500 commission therefor. Knight paid Reynolds $600 and Reynolds paid that to the bank on Widell's indebtedness. Knight paid Reynolds $100, his solicitor's fee for Mrs. Widell, which by the decree was to be paid by Swan Widell. Knight appropriated to himself something like $569.00 as his compensation for arranging this deal. By these transactions, which all culminated on or about September 16, 1916, Mrs. Widell was deprived of her equity in lot 6 and of the obligation of Froburg to pay her a large sum of money, and her solicitor's fee was paid out of her property and not by Widell as the decree required.

It is clear that Reynolds took the title to this collateral security as trustee. He was not only trustee for the bank but also for Mrs. Widell. He had no written authority to foreclose or sell the property, and all that he did was without authority of law. Peacock v. Phillips, 247 Ill. 467. His position as trustee was fully known to the bank, whose agent and attorney he was, and it is bound by all the knowledge he obtained while so acting, and it was also with the full knowledge of Knight. The only excuse attempted for this disposition and sacrifice of the property rights of Mrs. Widell was in the testimony of Knight and Reynolds, in which they claimed that Mrs. Widell indicated to them that she expected nothing out of lot 6 or did not claim anything from it or, as Knight seeks to establish, that he was welcome to whatever he could make out of it. These conversations are denied by her, and if they took place at all it is clear that these parties and especially Knight sought to overawe her

by dwelling upon the great indebtedness of Widell, and the danger that he would be prosecuted criminally unless his debts were paid. Mrs. Widell received nothing out of this unauthorized sale of this property. Mrs. Widell testified that Reynolds promised her that he would let her know when there was anything new about the Froburg property. He did not communicate with her what had been done, and she first learned of it more than a year afterwards, and that information came indirectly from her divorced husband. She then employed an attorney to investigate the situation and afterwards filed this bill.

It is argued that this suit should have been at law and that equity has no jurisdiction. This property was held by Reynolds in trust and that trust was violated, and we are of opinion that equity has jurisdiction of such a case. Steele v. Clark, 77 Ill. 471. No replication seems to have been filed to the answer of Knight. He contends that therefore his answer should have been taken as true. If a cause is submitted on bill and answer and without replication and without proofs, the answer is taken as true, but where a case is submitted upon bill, answer and proofs, that rule does not apply. Corbus v. Teed, 69 Ill. 205; Becker v. Becker, 241 Ill. 420. The court dismissed the bill for want of equity as to Froburg. That apparently was on the ground that he was not acquainted with the fact that Reynolds held said property in trust, and was not aware of the equities of Mrs. Widell. After having reached that conclusion, the trial court could not permit Mrs. Widell to redeem the land from the hands of an innocent purchaser, but must otherwise adjust the equities between the bank, Reynolds and Knight. In doing so the court sought to ascertain the value of the equity of redemption owned by Mrs. Widell at the time of these transactions, after deducting all for which this collateral security had been furnished. The court in doing so fixed the value of lot 6 at $5,000. Complaint is made of this. There was evidence that this property was worth

by dwelling upon the great inadequacy of [illegible], and [illegible]
that he would be prosecuted criminally under [illegible]
Mrs. Ridell received nothing out of this [illegible]
this property. Mrs. Ridell testified [illegible] that he would let her know when [illegible]
[illegible] property. He is not [illegible] [illegible]
[illegible], and she first learned of it [illegible]
and that information [illegible] [illegible]
the lien employee an attorney to investigate the [illegible]
afterwards filed this bill.

It is argued that this bill should have been [illegible]
equity has no jurisdiction. This is only [illegible]
in trust and that trust was violated, and [illegible]
equity has jurisdiction of such a case. [illegible] v. [illegible], [illegible]
471. No really plain cases so have been filed [illegible]
[illegible]. He contends that therefore [illegible]
[illegible] as true. If a case is submitted on [illegible]
[illegible] replication and without proof, [illegible]
true, but where a case is submitted upon bill, [illegible]
that rule does not apply. [illegible] v. [illegible], [illegible]
v. Booker, [illegible] Ill. 620. The court [illegible]
of equity no to [illegible]. [illegible]
he was not [illegible] [illegible]
[illegible] in trust, [illegible]
After having received [illegible], the [illegible]
permit Mrs. Ridell to redeem the land [illegible]
innocent purchaser, but must [illegible]
the land, [illegible] and Ridell. [illegible]
to ascertain the value of the equity of redemption [illegible]
Mrs. Ridell at the time of these transactions, [illegible]
all for which this collateral security had been [illegible]
court in doing so fixed the value of [illegible]
in made of this. There was evidence [illegible]

$4,000, other evidence that it was worth $4,500, and other evidence that it was worth $5,000. There was also proof that there was upon said real estate a dwelling house and other buildings. We are of opinion that the court did not err in fixing $5,000 as the value of the property. Of course, Mrs. Widell was entitled to the value of the property at the time it was unlawfully taken away from her, and not merely its value now when the price of real estate has depreciated. The court decided from the evidence that the net value of her interest in this property on September 16, 1916, was $1,392, and that she was entitled to interest at 5% from that date to the date of the decree, which amounted to $298.60, making a total sum for which each of the three defendants were liable of $1,690.60. The court entered a separate decree against Reynolds and the bank and Knight for that sum, and provided that when the total sum of $1,690.60 and interest thereon and costs should be fully satisfied to the complainant, the decree should be released. The proofs warranted the decree and warranted the amount fixed.

The appellants filed ajoint abstract and did not abstract the bill, the answer or the decree. If the case had stood in this court in that way we should have been obliged to affirmed the decree, since without an abstract of the pleadings and the decree, we could not know what issues were presented nor how they were decided. But appellee filed an additional abstract, supplying these and some other defects. More than one month later appellants filed an additional abstract. There are numerous exhibits in the record which are not sufficiently abstracted by any of the parties. The costs of all the abstracts will be taxed against appellants.

Decree affirmed.

$24,000, other evidence that it was worth $4,[illegible], or some evidence that it was worth $5,000. There was, the record was [illegible] was upon said real estate a dwelling house [illegible]. We are of opinion that the court did not err in [illegible] as the value of the property. Of course, [illegible] titled to the value of the property [illegible] taken away from her, and not merely the value [illegible] of real estate has to consider. The court [illegible] dence that the net value of her interest in the property [illegible] is, indeed, was $4,[illegible], and that [illegible] interest at $[illegible] then due to the [illegible] amounted to $[illegible].00, making a total [illegible] the total liability was $[illegible]. The court [illegible] accurate dower quantum appertain and the [illegible] sum, and provided that upon the total [illegible] [illegible] est thereon and costs amount to [illegible] in the [illegible] ant, the dower should be [illegible]. The [illegible] [illegible] and [illegible].

The appellants filed a plea [illegible] bill, the answer to the [illegible]. If the case [illegible] court in that way we cannot [illegible] decree, since without a [illegible] we could not know that [illegible] decided. But [illegible] on [illegible] these and some other [illegible]. [illegible] appellants filed an additional [illegible] exhibits in the record and not [illegible] any of the parties. The costs of all the [illegible] [illegible] against [illegible].

[illegible].

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 13th day of March in the year of our Lord one thousand nine hundred and twenty-two

Justus L. Johnson

Clerk of the Appellate Court.

6976

2129a

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-one, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

224 I.A. 622

BE IT REMEMBERED, that afterwards, to-wit: on the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

The People, etc., Defendant in error, vs. William Schmidt, Plaintiff in error,	Error to County Court of Lake.

DIBELL, P.J.

224 I.A. 622

An information containing nine counts was filed in the county court of Lake County against William Schmidt, charging various offenses under the statute concerning the manufacture, possession and use of intoxicating liquor within prohibition territory. Some counts charged defendant with unlawfully selling such liquor in said county of Lake when it was prohibition territory. Defendant was convicted under the sixth and ninth counts. The sixth charged that he unlawfully kept for sale intoxicating liquor in such prohibition territory. The ninth count charged him with being the keeper of a place where such liquor was unlawfully sold and described the premises and declared that defendant at such place kept a common nuisance. Defendant pleaded not guilty, was found guilty under said two counts and was fined $600.00 and sentenced to imprisonment in the county jail for thirty days. Defendant sued out this writ of error to review said proceedings.

Officers visited said premises with a search warrant issued by two justices of the peace and searched the building and took therefrom various receptacles containing what was proved to be whiskey and other intoxicating liquor and the same were offered and admitted in evidence over objection that the same had been unlawfully obtained. Afterwards defendant offered in evidence said search warrant and then moved to exclude said exhibits on the ground that the search warrant was insufficient in form

and therefore the seizure of the goods was illegal and therefore they were not competent evidence against defendant. There are some slight informalities in the search warrant. We find it unnecessary to determine whether such informalities make the search warrant void and the seizure illegal or otherwise. In this State papers and documents illegally seized from a defendant's possession are admissible in evidence against him in a criminal case if otherwise competent. Courts will not take notice of how they are obtained. Peo. v. Paisley, 288 Ill. 310; Trask v. Peo., 151 Ill. 523; Siebert v. Peo., 143 Ill. 571; Gindrat v. Peo., 138 Ill. 103. We so held in People v. Munday 204 Ill. App. 24, and in People v. Hartenbower, 208 Ill. App. 465. The court permitted a witness for the People to read a label on exhibit 1 over defendant's objection. This label indicated that the contents were whiskey. This should not have been permitted at that time, since said exhibit 1 had not yet been admitted in evidence, but it was offered afterwards and properly admitted, and the label became competent and no harm was done to defendant.

The evidence clearly established the guilt of the defendant under count 6 and it need not be stated here.

The building abated by the judgment of the court under count 9 consisted of a basement and two stories above it. It is contended that the abating should not have gone to the whole building. Liquor was sold in the basement and also on the first floor in front. There was a pool room at the back occupied by a tenant of defendant who also had a bed room on the second floor. The person selling liquor, whether defendant or some one working for him, passed through the pool room often to get liquor which was stored in the rear end of the pool room. The pool room therefore was properly abated. At the time of the trial that tenant had left the premises. There was a dumb waiter from the basement to the top story of the building and in it

quite a quantity of liquor was found. Liquor was also concealed in the bedroom occupied by defendant and in other places in the house. We do not doubt that it was proper to abate the whole building, unless it be as to two rooms occupied by a doctor who was a tenant of defendant. It is not shown that his rights as a tenant extended beyond the date of the judgment. If he had rights as a tenant in those two rooms extending later than the date of the judgment, it may be those rooms could not be closed as to him, but we conclude defendant cannot complain thereof in the present state of the proof on that subject.

The judgment is therefore affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 13th day of March in the year of our Lord one thousand nine hundred and twenty-two

Justus L. Johnson

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-one, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

The People of the State of Illinois, Defendant in error, vs. Theressa Sheldon, Plaintiff in error,	Error to county court of Lake.

DIBELL, P.J.

224 I.A. 522

An information was filed in the county court of Lake County against George Sheldon and Theressa Sheldon, his wife, containing nine counts, charging violations of the liquor laws of the State. They need not be stated, as the defendants were acquitted as to them. Before the trial a tenth count was filed by leave of court, which charged that defendants were the owners of a place where intoxicating liquor was unlawfully manufactured in a certain cottage on certain described premises, and that defendants knowingly and unlawfully permitted the manufacture of intoxicating liquor therein and knowingly permitted the keeping of a common nuisance there. Defendants were convicted under this count and each moved for a new trial. That motion was granted as to George Sheldon and denied as to Theressa Sheldon. She was find $400 under said count 10, and sentenced to imprisonment in the county jail for 30 days and to pay the costs, and it was ordered that if, at the expiration of the time of imprisonment, said fine and costs be not paid, she then be further confined in the county jail until said fine and costs are satisfied and worked out at the rate of $1.50 per day. It was further adjudged that the premises described in said order be abated till she give bond in the penal sum of $5,000, conditioned according to the statute in that case provided. She has sued out this writ of error to review said proceedings.

The premises described in the 10th count of the information

The People of the State of Illinois,

Defendant in error,

vs.

Theresa Conley,

Plaintiff in error,

Error to Rock Island County

of Ruby.

Mr. J. J.

An information was filed in the county court of Rock Island against George Sheldon and Theresa Conley, his wife, conducting mine counts, charging violations of the liquor laws of the state. They need not be stated, as the information was quashed as to them. Before the trial a fourth count was filed by leave of court, which charged that defendants were the owners of a place where intoxicating liquor was unlawfully manufactured, a certain cottage on certain described premises, and that defendants knowingly and unlawfully furnished the manufacture of intoxicating liquor therein and knowingly permitted the keeping of a common nuisance there. Defendants moved to quash this count and each moved for a fair trial. That motion was granted to George Sheldon and denied as to Theresa Conley. The jury found $400 under said count 4b, and sentenced to imprisonment in the county jail for 60 days as to the wife, and it also ordered that if, at the expiration of the time of imprisonment, said fine and costs be not paid, the wife be further confined in the county jail until such fine and costs be satisfied at the rate of $1.50 per day. It was further adjudged that the premises described in said order be sold till the bond in the penal sum of $2,000, conditioned according to the statute in that case provided. She has sued out this writ of error to review said proceedings.

The premises described in the 10th count of the indictment

and the premises so directed to be abated are not the same, and apparently are in different sections of land. The bill of exceptions states that during the trial, the State's Attorney asked and obtained leave to amend the description of the real estate in said count 10. Said count 10 was not amended. Granting leave to amend a pleading does not constitute an amendment thereof. Laudt v. McCullough, 206 Ill. 214, 223. Upon reading the evidence in the record, we doubt whether either the description in the information or in the judgment covers the premises where the cottage here in question is located.

We are of opinion that the evidence did not warrant the jury in finding that Mrs. Sheldon either "knowingly permitted," or permitted at all, the manufacture of liquor at the place here in question. Mr. and Mrs. Sheldon occupied an 80 acre farm and had thereon a large dwelling house, a barn, a garage, etc. Somewhere near the rear of that farm and not on the farm itself were cottages near a lake called Fourth Lake. Mrs. Sheldon owned eight or nine such cottages and there were other cottages belonging to other people near by. One cottage had been occupied by a tenant named Kukar, and about the first of May, 1920, Mrs. Sheldon gave Joe Pavlick an oral lease of the cottage here involved. One witness testifies that the rental was till the following May, another that it was till the end of the season, with permission to stay there till Spring. Pavlick got his key from Kukar, the previous tenant, and stayed there with his family about five months, and then removed to Waukegan, and as he went by the home of Mrs. Sheldon, he told her that she might rent it to some one else, and if she did, he would like to have her sell the furniture he had in the cottage. The People's witnesses said this cottage was about 800 feet from the Sheldon home. Mrs. Sheldon testified that it was three-quarters of a mile distant. She could not see the cottage from her home without going upstairs. Her home was south of the cottage, while

the search here made involved the north porch of the cottage and the inside of the cottage, neither of which were visible from the Sheldon home. No witness ever saw Mrs. Sheldon at or near this cottage within a year before the search here involved. She testified that she had not been there for more than a year. Between 4:30 and 5 o'clock of the morning of March 15, 1921, officers went to that cottage in search of one Joe Miekus, for whom they had a warrant. The cottage was closed. On the north porch they found various receptacles suited to the manufacture of liquor, and several empty milk cans bearing the initials "G.S.", which the prosecution infer means George Sheldon. An officer went to Sheldon's house and got him out of bed and brought him to the cottage with a bunch of keys, none of which would open the cottage. An officer then broke open a door on the north porch and in the cottage were found what was proved to be whiskey, still warm, and mash from which whiskey is made. No one testified to anything else connecting Mrs. Sheldon in any way with the manufacture of this liquor in that cottage or showing that she had any knowledge thereof. There was nothing to show how long this cottage had been so occupied. The materials might have been there a long while or but a day or two. She testified that she had no knowledge whatever that the cottage was being used for that purpose. We are of opinion that the evidence did not justify her conviction.

We should notice another matter. After a witness for the People had been examined for a time, the State's Attorney said to the court in the presence of the jury that the witness had told him differently in his own office, and he asked leave to cross examine the witness, and the court permitted the State's Attorney to cross examine him. We are of opinion that the State's Attorney should not have stated in the hearing of the jury that the witness had made a different statement to him. If the State's Attorney wished to make that statement to the court, he should first have asked to have the jury withdrawn. If he wished to

the search here made involved the north porch of the cottage and the inside of the cottage, [illegible] from the [illegible]. No witness ever [illegible] at or near this [illegible] [illegible]. [illegible] than a year. Between 4:30 and 5 o'clock of the morning of March 15, 1921, officers went to that cottage in search of one Joe Mitchus, for whom they had a warrant. The cottage was closed. On the north porch they found [illegible] to the manufacture of liquor, [illegible] the initials "[illegible]", which the prosecution [illegible] Sheldon. An officer went to Sheldon's house and got him [illegible] him to the cottage [illegible] the cottage. [illegible] on the north porch and in the cottage [illegible] to be whiskey, still warm, [illegible] to anything else [illegible] the manufacture of that liquor in that cottage [illegible] that she had any knowledge [illegible] this cottage had been occupied. [illegible] [illegible] that she had [illegible] being used for [illegible] [illegible].

In [illegible] the court, [illegible] in the [illegible] [illegible], [illegible] [illegible] [illegible] to [illegible] [illegible] [illegible] [illegible] [illegible] to [illegible] to the court, he would [illegible]. If he [illegible] to

prove that fact before the jury he should have been sworn and examined as a witness. When the court became satisfied that the witness had made a different statement before, then it was proper to permit him to be cross examined by the State's Attorney, under several authorities in this State.

The judgment is reversed and the cause is remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 13th day of March in the year of our Lord one thousand nine hundred and twenty-two

Justus L. Johnson

Clerk of the Appellate Court.

6980 21312

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-one, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

224 I.A. 622

BE IT REMEMBERED, that afterwards, to-wit: on [illegible] the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Edward Hinkley, appellant,
vs.
International Harvester Company,
appellee,

Appeal from Winnebago.

DIBELL, P.J.

This is an action on the case, brought by Edward Hinkley against the International Harvester Company. The declaration contained two counts. The first count charged that on or about January 10, 1920, defendant was in the business of manufacturing, selling, repairing, etc., farm machinery, and especially gasoline engines, and employed divers servants in and about said business in the County of Winnebago, and did at the date before stated send one of its servants to plaintiff's farm in Winnebago County to alter and repair a certain gasoline engine; that said servant of defendant, so repairing said gasoline engine, was in the business of and in the employment of defendant and under the direction of defendant, and was then and there acting for defendant in the scope of his employment in repairing said gasoline engine; that while so repairing said engine, defendant requested and required the assistance of plaintiff and requested plaintiff to assist in making said repairs, and that the plaintiff, at the special instance and request and under the direction of said servant of defendant, did aid said servant in repairing said engine and in so doing used all due care and caution for his own safety; that defendant through its said servant negligently started or caused said engine to start without giving any warning to plaintiff while plaintiff was then and there aiding defendant; that by and through said negligent conduct of defendant by its said servant, said engine and parts of the machinery thereon were started quickly, without notice to plaintiff and plaintiff was struck with great

violence by parts of the said engine and his arm and hand were caught and severed from his body and he was thereby greatly injured, etc. The second count was similar, except it charged wilful and wanton conduct by defendant. Defendant pleaded the general issue. The cause was tried by a jury. At the close of all the evidence the court, at the request of defendant, instructed the jury to find the defendant not guilty. That verdict was rendered and there was a judgment for defendant thereon, from which plaintiff appeals.

The proof for plaintiff tended to show that in January, 1920, he operated a farm and used a Monitor gasoline engine to pump water and had difficulty with the engine and went to defendant's plant in Rockford and asked the manager at the rear office if he had any body that could fix a gasoline engine and was sent to the manager in the main office, who was the branch manager of defendant at Rockford, that plaintiff inquired if he had a mechanic who knew how to fix a gasoline engine; that the manager went into another part of the building and returned with a man named Powell, and the manager told plaintiff "we have a man here we believe can fix the engine", that the manager asked plaintiff how the man was to get to the farm, and plaintiff said he had a sleigh there and would take him out right away; that Powell went back into the building, got a kit of tools and gallon of gasoline from a tank belonging to defendant, and plaintiff took Powell to his farm, and Powell went to work at the engine, while plaintiff went about other work; that afterwards plaintiff came to the engine and watched Powell at work; that Powell started to connect the tank with the engine, and asked plaintiff to hold the tank upright while he made the connection and plaintiff did so; that in order to hold the tank level, he put his right hand under the tank and just in front of the pumping jack; that plaintiff was holding the tank with both hands while the engine was not running;

violence by parts of the steel engine and the [illegible]
caught and removed from his body and he was [illegible] by
injured, etc. The second count was similar, [illegible]
[illegible] and [illegible] [illegible]
general issue. The cause was tried by a jury. At the close of
all the evidence the court, on the request of [illegible], instruc-
ed the jury to find the defendant not guilty. Then verdict was
rendered and there was a judgment for defendant [illegible], from
which plaintiff appealed.

The proof for the plaintiff tended to show that [illegible]
be operated a drum and used a [illegible] engine to [illegible]
water and had difficulty with the engine [illegible] the [illegible]
plant in Rockford and where the manager of the [illegible] if
he had any body that could fix it. [illegible] the manager in the main office, and the [illegible]
defendant in Rockford, that [illegible] it [illegible]
mechanic who knew how to fix a gasoline engine; that [illegible]
went into another part of the building [illegible]
named Powell, and the manager told him [illegible]
we believe can fix the engine", that the manager [illegible]
how the man was to get to the [illegible]
alight there and would take him out [illegible]
last like the machine, and [illegible] of [illegible]
from a tank [illegible] to Rockford, [illegible]
to his room, and Powell went on [illegible]
that work [illegible] that [illegible]
engine [illegible] that [illegible]
the work all the morning, and [illegible]
[illegible] the [illegible]
in order to look the tank [illegible] [illegible]
work and just in front of the machine [illegible]
holding the tank with both hands while the engine was [illegible]

that shortly thereafter and without warning to plaintiff, Powell started the fly wheel of the engine and this started the pump jack to move, and caught plaintiff's right hand between the pump jack and the tank; that the stroke of the pump jack broke the fingers and bones of plaintiff's right hand and wedged his arm between the pump jack and the tank and stopped the engine; that plaintiff called to Powell to turn it back, but instead Powell turned it forward and thereby cut off plaintiff's right hand and wrist. Plaintiff was thereafter taken to a hospital. Plaintiff was asked on cross examination if he did not say and do certain other things in the presence of the manager or Powell, and he denied that he did. Plaintiff was corroborated by other witnesses. Defendant proved that its general business was manufacturing and selling agricultural implements; that when plaintiff came to their plant, the assistant manager told him they maintained a service department solely to take care of their own engines and never did anything outside; that the manager said he guessed they had better do something for plaintiff, and the assistant manager found Powell, who said he could probably fix the engine; that plaintiff asked the assistant manager how much it would cost him and the latter replied that they could not make any charge for it. Defendant proved that plaintiff's engine had not been sold by defendant. The manager testified that he told plaintiff that they made repairs only on machines which they sold, but they would see what they could do to help him, and that he found Powell and asked him to go and repair the engine and to take a gallon of gasoline with him, and that he told Powell there would be no charge for the job. In rebuttal plaintiff testified that he did not ask what they would charge and there was nothing said about making repairs without charge. Plaintiff offered to prove that he went to plaintiff's office afterwards and offered to pay for Powell's services and that defendant refused to accept any pay.

Defendant claims that this is a case where a servant is loaned by his master to a third party for some special service, and that he thereby became the servant of the third party, and was not then at work for defendant. We think that plaintiff's evidence does not establish such a case. Defendant paid Powell for his time and work; it sent along its gallon of gasoline and its tools. Plaintiff did not direct the work. At the most it would be a question for the jury to decide whether Powell was working for defendant under its direction, or was by defendant loaned to plaintiff. In our opinion plaintiff's evidence made a case for plaintiff. We do not think it constitutes a defense that defendant was not in the practice of repairing gasoline engines except in cases where it made and sold the engine. We do not think that defendant is sustained by the evidence in its contention that it was the duty of plaintiff at his peril to ascertain whether the manager at Rockford had authority to send a man to repair's plaintiff's engine or to ascertain the authority of Powell to ask plaintiff to help him hold the tank upright. We conclude the court was not justified in directing a verdict for defendant.

The judgment is therefore reversed and the cause remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____ _____in the year of our Lord one thousand nine hundred and twenty-

Clerk of the Appellate Court.

7002

2/32a

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-one, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

224 I.A. 622

BE IT REMEMBERED, that afterwards, to-wit: on the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Isaac Goldberg, appellee,
vs.
William M. Pearl, appellant,

Appeal from County Court of Lake.

DIBELL, P.J.

On May 26, 1921, Isaac Goldberg brought this suit against William M. Pearl in the county court of Lake County to recover possession of a certain theatre building and the premises on which the same stood in Highland Park, which Goldberg had leased to Pearl. The complaint was filed and a plea of not guilty, a jury was waived, and the cause was tried upon an agreed state of facts and there was a finding and a judgment for Goldberg, from which Pearl appeals.

On July 21, 1913, the parties entered into a lease by which Goldberg leased said premises to Pearl with a building to be erected thereon, as described, from October 1, 1913 until September 30, 1918, at a rental of $100. per month payable in advance each month. Pearl agreed to pay Goldberg $1,000. which Goldberg was to retain for certain purposes specified. Goldberg still has the $1,000. and the agreements concerning that are not involved in this appeal. Said lease contained the following provision, which is the subject of this suit: "Said building to be used and occupied as a family theatre for the presentation of wholesome moral attractions, including moving picture exhibitions and not otherwise." Two days later the parties entered into an additional agreement, by which the building was to be wider than provided in the original lease and Pearl was to pay $150. per month monthly in advance. Pearl entered into possession on October 1, 1913, and until July 21, 1917, used said building as a family theatre, including moving picture exhibitions, but on the latter date he closed the building and discontinued its use for any purpose. He paid the rent during the entire period. There was a provision in the lease, by which Pearl

Isaac Pfaffing, Appellee,

vs.

William M. Ford, Appellant.

Appeal from Bond Court of Cook.

Opinion filed:

92412.A. 822

On May 20, 1902, Isaac Pfaffing commenced his suit against William M. Ford in the Bond Court of Cook County to recover possession of a certain theatre building and to enjoin the defendant from the same about it Highland Park, which building had been in the occupancy of the complainant and a plea of not guilty, a jury was waived and the cause was tried upon an agreed state of facts and there was a finding and a judgment for defendant, from which Pfaffing appealed.

On July 21, 1902, the parties entered into a stipulation in writing, filed in the Bond Court, by which, on the 20th day of May, 1902, at a rental of $600, per month payable in advance, the premises were leased to Ford, who paid $2,000, which he was to receive for certain purposes specified, the balance of the $2,000, and the agreements concerning which are not material in this opinion. Said lease contains the following provisions, which are the subject of this suit: "Said building is to be used for the family theatre for the presentation of plays, vaudeville, including moving pictures and illustrations, but not to be used for any other purpose, and Ford was to pay $100, per month rental, and relinquish into possession on October 1, 1902, and April 1, 1903, said building is to be used for the, including moving pictures and illustrations, but on the latter date to remove the building from the premises and the premises to be left in good condition in the same condition in which they were when received. There was a condition in the lease, by which, if Ford failed to pay the rent, the lease was to be forfeited.

at a certain period before the expiration of that lease, could give Goldberg notice of his intention to renew it for five years from September 30, 1918. Within that time before the expiration of the first lease Pearl did give Goldberg notice of his intention to renew the lease for five years. Goldberg knew at all times when Pearl was not using the premises. After receiving that notice, on August 22, 1918, and before the expiration of the first lease, Goldberg wrote Pearl a letter, the body of which is as follows: "You can have my theatre for five years more as long as you pay me $150. and I fix the doors when you want to open my theatre again." This was over a year and a month after Pearl had ceased to use the theatre and permitted it to remain idle. Goldberg continued to accept the rent without any objection up to and including the month of September, 1920. On September 29, 1920, Goldberg served notice on Pearl that because of his failure to occupy the building as a family theatre he would declare the lease terminated, unless Pearl complied with that provision on or before November 20, 1920. On December 1, 1920, Goldberg refused to accept payment of the rent for that month when tendered to him, and Pearl on that day deposited the rent in the State Bank of Highland Park to the order of Goldberg. On December 23, 1920, plaintiff demanded of Pearl immediate possession of the premises and on December 24, 1920, began an action of forcible detainer to obtain possession of the property, and declared a forfeiture of the lease because the premises were not being used by Pearl. Issue was joined in that case. Pearl continued to tender the rent each month and upon Goldberg refusing to receive it, deposited it in the State Bank of Highland Park to Goldberg's order. On March 2, 1921, Goldberg dismissed that suit and took the rents which had so been tendered and kept good. On January 15, 1920, Pearl notified Goldberg to fix the doors of the building, as he wanted to open the theatre. Goldberg replied that he would fix them. On February 1, 1920, Pearl again notified Goldberg to fix the doors as he wanted to open the theatre,

at a certain period before the expiration of that lease, could give Goldberg notice of his intention to renew it for five years from September 30, 1918. Within that time before the expiration of the first lease Pearl did give Goldberg notice of his intention to renew the lease for five years. Goldberg [illegible] Pearl was not using the [illegible] on August 22, 1918, and before the expiration of the first lease, Goldberg wrote Pearl a letter, the body of which [illegible] "You can have my theatre for five years [illegible] as $150, and I [illegible]." [illegible] to use the theatre and permitted it to remain idle. Goldberg continued to accept the rent without any objection up to and including the month of September, 1920. [illegible] served notice on Pearl that because of his failure to occupy the building as a family theatre he would declare the lease forfeited, unless Pearl complied with that provision on or before [illegible] 1920. On December 1, 1920, [illegible] the rent for that month when tendered to him, and [illegible] deposited the rent in the State [illegible] to the order of Goldberg. On December 23, 1920, [illegible] immediate possession of the premises [illegible] an action of forcible [illegible] to obtain [illegible] property, and declared a forfeiture of the lease [illegible] not being used by Pearl. [illegible] Pearl continued to tender the rent each month and Goldberg refusing to receive it, deposited it [illegible] Goldberg's order. On March 1, 1921, [illegible] suit and took the [illegible] good. On January 10, 1921, [illegible] of the building, [illegible] the theatre. [illegible] replied that he would [illegible]. On February 1, 1921, Pearl [illegible] Goldberg to fix the doors as he wanted to [illegible]

and Goldberg replied that he would. But Goldberg did not fix the doors nor make any attempt to do so. On March 4, 1921, Goldberg accepted from Pearl the rent for the month of March, 1921. On March 8, 1921, Goldberg again notified Pearl that he would forfeit his lease unless he opened up the theatre within 60 days. April 1, 1921 Pearl paid and Goldberg accepted the rent for April. The same thing occurred on May 1, 1921, for the month of May. On March 21, 1921, Goldberg served on Pearl a notice in writing demanding immediate possession. The rent for June, 1921, was tendered by Pearl to Goldberg and refused and the tender was kept good and Pearl has been ready and willing to pay each month's rent when due ever since. On May 26, 1921, this suit was begun. Goldberg contends that the true construction of the provision above quoted from the lease is that Pearl must continually use the building as a family theatre for the presentation of wholesome moral attractions, including moving picture exhibitions, and that Goldberg had a right to declare the lease forfeited because the building had been idle. There is no claim that Pearl failed to present wholesome moral attractions whenever he ran the theatre. The failure to use the theatre is the only ground on which the alleged forfeiture of the lease is sought to be sustained. If the provision above quoted permits the construction contended for by Goldberg, yet it can just as reasonably be construed otherwise. Goldberg is the grantor and lessor and the one who prescribed the conditions and the construction favorable to the lessee should be adopted. In Schmohl v. Fiddick, 34 Ill. App. 190, on p. 198, the court said:

> "It is a familiar canon of construction that all grants, contracts, deeds, and leases of every description shall be most strongly construed against the grantor, and if there be any doubt or uncertainty as to the meaning of any such grant, deed or lease, it shall be construed most strongly in favor of the grantee. Or if the contract may be given two constructions, either of which is reasonable, the one most favorable to the grantee shall be adopted."

This rule requires the adoption of the construction that the quoted words do not require continuous occupation of the building.

We are of the opinion that the parties did not mean by the provision above quoted from the lease that Pearl covenanted to use the building continuously. In our opinion, if the landlord had intended to have the tenant contract for the continuous use of the building, he would have caused such an express provision to be inserted and would not have left that matter to dubious conjecture. It should be construed to mean, either that only moral attractions should be presented or that the building should only be used as a family theatre with moral attractions. It is not necessary for us to determine which is the legal meaning of the terms used, for under either construction the condition has not been violated and plaintiff has no case and, as Goldberg stated no other case in his complaint, the court should have granted Pearl's motion to dismiss the complaint which he made and which the court denied before he pleaded to the complaint.

If Goldberg's construction of the provision aforesaid is a possible one, yet the parties by their acts for a long space of time have adopted a construction contrary to that now claimed by Goldberg. The building had been unused for more than a year when the lease was renewed. Goldberg at all times knew when it was not in use. In his letter of August 22, 1918, Goldberg recognized that the theatre was not opened and promised to fix the doors when Pearl wanted to open the theatre again. After the new lease was given he continued for a long time to accept rent monthly while the theatre was closed. He once sought to forfeit the lease on that account and brought suit for possession and afterwards dismissed that suit and accepted the payments which had been deposited in the bank to his order. He accepted payments of rent even after he had given notice the second time that he would forfeit the lease on that account. In People ex rel v. Murphy, 119 Ill. 159, on p. 166, the court laid down the rule we refer to in the following language:

> "It is a familiar rule of construction, that where the terms of an agreement are in any respect doubtful or uncertain, and the parties to it have, by their conduct, placed a

> construction upon it which is reasonable, such construction will be adopted by the courts, in the event of litigation concerning it."

To the same effect are Burgess v. Badger, 124 Ill. 288; Finch v. Theiss, 267 Ill. 65; and Schmohl v. Fiddick, supra. Under the construction whichthe parties have adopted, there has been no failure by Pearl to perform the obligations of this lease, and Goldberg has neither stated in his complaint nor proven a case entitling him to possession of the premises.

The judgment is therefore reversed.

(Finding of facts to be incorporated in the judgment.

We find that Pearl has not violated any condition of the lease here in question, either as we construe its meaning to be or as the parties have construed it to be by their acts and conduct, and that Goldberg has neither stated nor proven a case entitling him to the possession of the premises for which this suit was brought.)

STATE OF ILLINOIS,
SECOND DISTRICT. } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 13th day of March in the year of our Lord one thousand nine hundred and twenty-two

Justus L. Johnson

Clerk of the Appellate Court.

William J. Smith, Administrator, etc., appellant, vs. J. Ernest Brook, et al., appellees,	Appeal from Lake.

DIBELL, P.J.

224 I.A. 623

William J. Smith, as administrator of the estate of Melvin D. Haynes, deceased, filed a petition in the County Court of Lake County, having jurisdiction of the administration of said estate, in which he stated that J. Ernest Brook, doing business as "Bank of Antioch", received a deposit of $1,400.00 from Melvin D. Haynes in his lifetime and issued a certificate of deposit therefor, and that said money was deposited upon the express agreement that Haynes "at any time, might receive the said sum of money, so deposited, and that to protect the Bank of Antioch in the performance of such agreement, the said J.E. Brook was to retain, and did retain and had in his possession, at the date of the death of said Melvin D. Haynes, the said certificate of deposit, and that the title to said deposit and the ownership thereof was in the said Melvin D. Haynes, at the time of his death." The petition prayed a citation against J. Ernest Brook and the Bank, requiring defendants to present said certificate and to appear and testify concerning said deposit, etc. J. Ernest Brook answered and admitted the deposit and that a certificate was issued therefor, but denied thatthe certificate was issued to Haynes and that the title to the money so deposited was in Haynes, but averred that said moneys were the property of Rumell A.M. Aubry at the time of the death of Haynes. The county court heard said cause and ordered said certificate to be turned over to said administrator. Defendants

VIII.

William J. Smith, Administrator, etc., Appellant, vs. J. Ernest Brock, et al., Appellees.	Appeal from Lake.

JUNGIN, J.D.

William J. Smith, as administrator of the estate of Melvin D. Haynes, deceased, filed a petition in the County Court of Lake County, seeking instructions of the administrator of said estate. In which he stated that J. Ernest Brock, acting instead of "Bank of Antioch", received a deposit of $1,400.00 from Melvin D. Haynes in his lifetime and issued a certificate of deposit therefor, and that said money was deposited upon the express agreement that Haynes "at any time, might receive the said sum of money, so deposited, and that to protect the Bank of Antioch in the performance of such agreement, the said J.E. Brock was to retain, and did retain and use in his possession, at the date of the death of said Melvin D. Haynes, the said certificate of deposit, and that he said deposit and the ownership "thereof was in the said Melvin D. Haynes, at the time of his death." The petition sought a citation against J. Ernest Brock and the Bank, requiring delivery by present said certificate and to render his faithful accounting said deposit, etc. J. Ernest Brock answered and admitted the account and that a certificate was issued therefor, but denied material allegations and averred to Haynes and that the title to the money so deposited was in Haynes, but averred that said money was the property of Annell A.M. Haynes at the time of the death of Haynes. The county court heard said cause and ordered said certificate to be turned over to said administrator. Defendants

appealed to the circuit court where the cause was tried without a jury, and defendants were discharged from said citation. The administrator perfected an appeal to this court.

The Bank of Antioch used a corporate name. J. Ernest Brook was treated as its cashier and Elmer Brook, brother of J.Ernest Brook acted as assistant cashier. In fact, there was no corporation and the Bank was owned by the Brook family. J.Ernest Brook was called as a witness by the administrator and was therefore competent to testify. He testified that Haynes in his lifetime did banking at the Bank of Antioch; that he came to the bank on February 13, 1918, and said to J.Ernest Brook that he wished to withdraw $1,400.00 from his account. J.Ernest Brook asked him what he was going to do with the money, and Haynes replied that he was going to give it to Rumell Aubry, who was, in fact, his grand-niece. Brook suggested that it would be better to put it in a certificate of deposit in her name, and that course was pursued. A certificate of deposit of that date was prepared and executed by J. Ernest Brook as Cashier, the body of which was as follows:

> "Melvin D. Haynes has deposited in this bank Fourteen Hundred ($1400.00) Dollars, payable to the order of Rumell Aubry, in current funds on the return of this certificate properly endorsed, twelve months after date, with interest at 3% per annum, for the time specified only. No interest after one year unless renewed."

J. Ernest Brook further testified that he made out the certificate; that Haynes never had possession of it; that Haynes had no understanding with Brook that Haynes could draw that money out at any time he wanted to, and that there was no arrangement made about Brook delivering it to anybody; that all Haynes told him was to hold it. The witness had no recollection that Haynes ever came into the Bank again and Haynes never gave J.E. Brook any other directions about the money and never had any other talk with him about it. Haynes was then in poor health and died about two months later. Defendants on cross examination sought to prove how Brook understood he was to hold it, from his conversation with Haynes.

appealed to the circuit court where the cause was tried without a jury, and defendants were discharged from such action. The administrator perfected an appeal to this court.

The Bank of Indian Creek, a corporation, was treated as its cashier and Minor Brook, brother of J.Harvest Brook acted as assistant cashier. In fact, there was no corporation and the bank was owned by the Brook family. J.Harvest Brook was called as a witness by the administrator and was therefore competent to testify. He testified that Haynes in his lifetime did banking at the Bank of Indian Creek; that he came to the bank on February 16, 1918, and said to J.Harvest Brook that he wished to withdraw $[illegible] from his account. [illegible] that he was going to do with the money, was [illegible] that he was going to give it to Russell Ambry, who was, in fact, his grandson. Brook suggested that it would be better to put it in a certificate of deposit in his name, and that Haynes was agreeable. A certificate of deposit in the amount was executed by J. Harvest Brook as cashier, the only officer of the bank, and was as follows:

"Indian Creek, Haynes has deposited in this bank Four Hundred ($[illegible].00) Dollars, payable to the order of Russell Ambry, in certificate funds on the return of this certificate properly endorsed, Twelve months after date, with interest at 8% per annum, in the time specified only. No interest after this date unless renewed."

J. Harvest Brook further testified that he made out the certificate; that Haynes never had possession of it; that Haynes had no conversation with Brook that Haynes could draw that money out at any time he wished to, and that there was no arrangement made about Brook delivering it to anybody; that all Haynes told him was to hold it. The witness had no recollection that Haynes ever came into the Bank again and Haynes never gave J.H. Brook any other directions about the money and never had any other talk with him about it. Haynes was then in poor health and died about two months later. Defendants at other investigation sought to prove the first conversation he had with Brook, from his acquaintance with Haynes,

The court sustained an objection to that question. Mrs. Blanche Aubry, a witness for defendants, testified that she was a niece of Haynes and the mother of Rumell Aubry, and that she met Haynes in Antioch in March, 1918, and Haynes told her to go to Brook's bank and she would find that he had left some money there for her daughter; that she then went to the bank and in answer to her inquiry was told that money was there for Aubry and that it was fixed for her in a certificate and she should get it. This evidence was not disputed. Haynes never thereafter sought any control over the fund evidenced by said certificate. The administrator argues that the direction to Brook to hold the certificate was in legal effect a direction to hold it for his benefit, and therefore by those words he retained control of the fund, and therefore the gift to Rumell Aubry was not completed. Rumell Aubry was a minor child and his relative. What Haynes told Mrs. Aubry, the mother, was competent against his estate. We are of opinion that Haynes intended a gift to this grand niece. A delivery of gifts to relatives and infants is not so strictly scrutinized as a delivery of gifts to adults and strangers. We conclude that by the putting of this fund into this certificate payable to Rumell Aubry and leaving the same in the bank, Haynes completed a gift to her.

Elmer Brook, assistant cashier of the bank, was a witness for defendants. He testified that he was present when Haynes gave these directions in the bank, and stood near his brother, the cashier, when the conversation narrated by his brother was had, and he stated that Haynes also said in substance that his niece was to receive this certificate or the money whenever she wanted it. If Elmer Brook was a competent witness this uncontradicted testimony further establishes that Haynes retained no control over this certificate, but directed it to be given to his niece, Rumell Aubry, whenever she called for it. Elmer Brook, at the time of the trial, was the guardian of Rumell Aubry, and his competency

was objected to for that reason. He had no personal interest in the result of the suit. If he was competent this furnishes an additional reason for affirming the judgment.

There is, however, one error in the record. There was a personal judgment against Smith for the costs, with an order for an execution against him. He brought this suit in his capacity as administrator and in apparent good faith in an effort to secure this certificate for the benefit of the heirs at law, and we find nothing in the record to justify a personal judgment against him for costs or an execution against him. The judgment is therefore affirmed, except as to the costs and as to that the cause is remanded to the court below, with directions to enter judgment for costs against the administrator as such, to be paid in due course of administration.

Affirmed in part, reversed in part and remanded with directions.

was objected to for that reason. He had no personal interest in the result of the suit. If he was competent this would be an additional reason for affirming the judgment.

There is, however, one error in the record. There was a personal judgment against Smith for the costs, with an order for an execution against him. He brought this suit in his capacity as administrator and in accounts good faith in an effort to secure this certificate for the benefit of the heirs at law, and we find nothing in the record to justify a personal judgment against him for costs or an execution against him. The judgment is therefore affirmed, except as to the costs and so that the cause is remanded to the court below, with directions to enter judgment for costs against the administrator as such, to be paid in due course of administration.

Affirmed in part, reversed in part and remanded with directions.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 13th day of March in the year of our Lord one thousand nine hundred and twenty-two

Justus L. Johnson

Clerk of the Appellate Court.

2123a

7021

2134a

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-one, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

JUSTUS L. JOHNSON, Clerk.

CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on [illegible] the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

J. M. Allen, appellee,)
vs.)
B. A. Zechlin, appellant,)

Appeal from County Court of Will County

224 I.A. 323

DIBELL, P.J.

This suit was brought before a justice of the peace by Allen against Zechlin to recover on a promissory note executed by Zechlin, dated May 9, 1917, due December 1, 1917, wherein Zechlin promised to pay to the order of Free Sewing Machine Co. $179.00 at the Citizens National Bank of Frankfort, Ill., for value received, with interest at six per cent per annum from maturity until paid and if not paid at maturity an attorney's fee of ten per cent on the amount to be collected. Allen claims as indorsee of said note. On the trial before the justice plaintiff had a judgment for $121.00 from which he appealed to the county court of Will County, where, upon a jury trial he had a verdict for $100.00, and on plaintiff's motion a new trial was granted. Before the new trial defendant filed a plea of set-off. On the second trial at the close of all the evidence the court directed and the jury returned a verdict for plaintiff for $235.29. A motion by defendant for a new trial was denied, and plaintiff had judgment for the amount of the verdict, and defendant prosecutes this appeal.

Plaintiff offered in evidence the note above described which bore the general indorsement of the Free Sewing Machine Co. and also an indorsement directing it to be paid to the order of any bank or banker, signed by the plaintiff. Pencil lines had been drawn through the words, "Pay to the order of any bank or banker." There was no affidavit or pleading denying the execution of the note or of the indorsements. By Section 45 of the Negotiable Instruments Law it is provided: "Except where an indorsement

C. E. Allen, appellee,	Appeal from County Court of
vs.	Will County.
T. - Ketchin, appellant,	

MIGNEY, P.J.:

This suit was brought before a justice of the peace by Allen against Keechin to recover on a promissory note executed by Keechin, dated May 9, 1917, due December 1, 1917, whereby Keechin promised to pay to the order of Free Sewing Machine Co. $17.00 at the Citizens National Bank of Joliet, Ill., for value received, with interest at six per cent per annum from maturity until paid and if not paid at maturity to attorney's fee of ten per cent on the amount to be collected. Allen sues as indorsee of said note. On the trial before the justice plaintiff had a judgment for $121.00 from which he appealed to the county court of Will County, where, upon a jury trial he had a verdict for $100.00, and on plaintiff's motion a new trial was granted. Before the new trial defendant filed a plea of set-off. On the second trial in the court of all the evidence the court directed and the jury returned a verdict for plaintiff for $100.00 and a motion by defendant for a new trial was denied, and plaintiff had judgment for the amount of the verdict, and defendant prosecutes this appeal.

Plaintiff offered to introduce the note sued upon, proving beyond the general indorsement of the free sewing machine Co. and also an indorsement discounting it to be paid to the order of any bank or banker, signed by the plaintiff. Several times had been thrown through the mails, "Pay to the order of any bank or banker." There was no affidavit to accompany showing the ownership of the note or of the indorsements. By testimony of the Superintendent Instrumentalis Line Co. is a partnership. "Proof that an indorsement

bears date after the maturity of the instrument, every negotiation is deemed prima facie to have been effected before the instrument was overdue;" so that by this instrument and the statute Allen was presumed to be the owner of said note before maturity. Plaintiff proved by a computation that the amount due on that day was $235.29. This made a case for plaintiff for that amount.

Defendant could not avail of a set-off if Allen became the indorsee of the note before maturity. In order to avail of a set-off, which was the only defense interposed, it was necessary to prove that Allen did not take the note till after maturity. Defendant called Hasenjaeger, cashier of the Citizens National Bank of Frankfort. He produced sheets from a collection register kept by the bank and sought to introduce in evidence the entries on that collection register relating to this note, which purported to show that it was received from the Free Sewing Machine Co. That record did not purport to show on what date it was received but noted that it was due December 1, 1917, and that it was returned on December 29, 1917. That record in and of itself could not be competent evidence as against Allen for he was not in any way connected with that entry. As to Allen it appeared to be wholly a transaction between other parties and not binding upon him. That record could be used under certain circumstances to refresh the recollection of Hasenjaeger if he needed to have his recollection refreshed and if he could make such proof concerning his memorandum as would show that he was entitled to use it to refresh his recollection. He made the entries. When and under what circumstances such entries may be used by a witness to assist his recollection are discussed at Length in Diamond Glue Co. v. Wietzychowski, 227 Ill. 338. Hasenjaeger did not bring himself within any of the rules laid down in that opinion. He may have made individual answers which, standing alone, would permit him to use this memorandum which was made by him in due course of business, but almost immediately the effect of such

Some date after the maturity of the instrument, every negotiation is deemed prima facie to have been effected before the instrument was overdue;" so that by this instrument the statute allen was presumed to be the owner of note before maturity. Plaintiff proved by a stockbroker that the market rate on that day was $488.15. This made a case for plaintiff for that amount.

Defendant counsel not avail of a set-off in order to reduce the interest of the note before maturity. In order to avail of a set-off, which was the only defense under oath, it was necessary to prove that allen did not make the note before maturity. Defendant called accountant, cashier of the Dominion Savings Bank of Toronto. He produced shows that a collection register kept by the bank and sought to introduce in evidence the entries on that collection register relating to this note, which purported to show that it [illegible]

That record did not support to show or what date it was received but noted that it was the December 1, 1917, and that it was returned on December 10, 1917. Such record is not of itself [illegible] [illegible] evidence to establish after he was not in any way [illegible] with that order. [illegible]

[illegible]

[illegible] under what circumstances such entries may be read by a witness to assist his recollection are discussed at length in [illegible] Co. v. Stevenson, 47 [illegible] 1. [illegible] himself within any of the rules laid down in that [illegible]. [illegible] [illegible] [illegible] result his to use this memorandum entry was made by him in the course of business, but almost immediately the issue of such

answers was destroyed by his further statements. From a reading of his whole testimony it is entirely clear that he had no real recollection of this transaction and that he did not himself return the note. He testified it was returned to the same party from whom he received it but he testified that not as anything he recollected, for he did not return it himself, but because that was the usual course of business in his bank. He had no recollection that it was received from the Free Sewing Machine Co. except the fact that he had so written on this register. The materiality of this testimony if it had been admitted was to show that when the note fell due it was in the control and possession of the Free Sewing Machine Co., and so remained till after its maturity, and therefore Allen could not have had it till after that date, and therefore a set-off could be introduced against Allen. Defendant's counsel called upon plaintiff's counsel to produce a supposed letter by which the Free Sewing Machine Co. had sent this note to the bank, it being the testimony of Hasenjaeger that the letter with which the note was sent to the bank was returned to the party with the note. Plaintiff's counsel responded that he was not the attorney for the Free Sewing Machine Co. and had no such letter, but that he did have there present a letter sent out with this note and with the notation on it, "Says no attention," signed "Citizens Bank," and that he was ready to tender this to counsel for the opposite party. Thereupon defendant's counsel interrogated Hasenjaeger about this letter. He was asked if that was the letter with which the note was returned and which accompanied the note when it came to the bank and he said he was not able to say. He was told by defendant's counsel that this letter purported to be dated November 23, 1917, and was signed by J. M. Allen, and was asked by defendant's counsel if he received a note with that letter, and he said he did not remember. This letter was not put in evidence, but its contents as far as disclosed by the question put by defendant's counsel to his own

witness must be assumed to be a correct statement of the reading of the letter. If therefore appears that for all Hasenjaeger knew or would testify this note may have been sent to his bank by Allen, the present plaintiff and indorsee of the note, under date of November 23, a week before the note matured, and Hasenjaeger may only have written the words "Free Sewing Machine Co." on the collection register because that was the name of the original payee in the note. It is therefore clear that Hasenjaeger did not know and could not remember and was unable to swear whether this note was received from the Free Sewing Machine Co. of from Allen, its indorsee. Therefore his evidence was not sufficient to go to the jury on the question whether in fact the Free Sewing Machine Co. still owned this note when it was due and thus overcome the presumption created by the statute. Hasenjaeger did not swear that he remembered from whom the note was received, nor that he knew this entry was true when he made it, nor that it refreshed his recollection of the circumstances except as to the date when the note was returned to the sendor. The court did not err in excluding the testimony of Hasenjaeger as to the party from whom the Citizens Bank received the note. There was testimony available to the defendant to prove the facts, if he desired. He could have subpoenaed some officer of the Free Sewing Machine Co. to bring whatever proofs the Company might have showing whether it sent the note to the bank and when it sent it, and when it sold the note to Allen. If his presence could not be procured depositions could have been taken and those facts could have been established. It therefore follows that the direction of the court was right, for no proof of set-off was admissible until there was evidence which would justify the jury in finding that Allen took the note after it was due, or which reasonably tended to establish that fact.

But we have examined the plea of set-off filed by Zechlin after the first trial in the county court, and also the proofs presented in support thereof, and are of opinion that he did

not succeed in establishing a set-off. Taking the allegations of the plea and his proof on the subject it seems that this note was given for five Free sewing machines purchased by him from the Free Sewing Machine Co. and that some one acting for that Company told him to sell these machines at $58.00 each, and told him that the Company would help him sell them; that some one whom he called an agent of the Free Sewing Machine Co., but whom he did not know to be such agent at all, came to him and took one of those sewing machines and sold it in the village of Frankfort, where defendant lived, for $38.00 instead of $58.00. It does not appear that this supposed agent had any authority to act for the sewing machine company, nor does it appear whether he paid this $38.00 to Zechlin and Zechlin accepted it, or what was done with the $38.00. Zechlin alleges that he could not after that sell these machines at $58.00 apiece and could not sell them for anything, and that the value of them was totally lost to him, but he did not prove those allegations. As far as appears this man who took the one machine from him and sold it may have been acting entirely on his own initiative and had no right to take the machine from Zechlin, and sell it, and if Zechlin foolishly allowed him to depreciate the price of those machines in that community he alone is to blame for it. There was nothing in the plea or in the evidence of defendant which would have justified the jury in allowing any set-off to Zechlin, if he had been able to prove that Allen took the note after maturity.

The judgment is therefore affirmed.

not succeed in establishing a set-off. Taking the allegation of the plea and his proof on the subject it seems that this note was given for five home sewing machines purchased by him from the Free Sewing Machine Co. [illegible] told him to sell them machines at $65.00 each, and tell him that the Company would help him sell them; that even one when he called on agent or the Free Sewing Machine Co., but when he did not know to be such agent at all, came to him and took one of these sewing machines and sold it in the village of Frankfort, where defendant lived, for $38.00 instead of $50.00. It does not appear that this agent had any authority to act for the sewing machine company, nor does it appear whether he paid this $50.00 to defendant and [illegible], or [illegible] the $38.00. Zoehlin alleges that he could not after that sell these machines at $38.00 apiece and could not sell them for anything, and that the value of them was totally lost to him, but he did not prove these allegations. As far as appears this man was took the sewing machines from him and sold it may have been working entirely on his own initiative and had no right to take the machine from Zoehlin, and sell it, nor if Zoehlin reasonably believed him to depreciate the price of these machines in that community he where is to blame for it. There was nothing in the plea or in the evidence of defendant which would have justified the jury in allowing any set-off to Zoehlin, if he had been able to prove that that took the note either wrongfully.

The judgment is therefore reversed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 13th day of March in the year of our Lord one thousand nine hundred and twenty-two

Justus L. Johnson
Clerk of the Appellate Court.

7037 (21332)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-one, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

224 I.A. 623

BE IT REMEMBERED, that afterwards, to-wit: on the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Josephine Pride, appellee,)
vs.) Appeal from Kane.
Letitia A. Westgate, appellant,)

DIBELL, P.J.

Mrs. Letitia A. Westgate was conservator of the person and estate of Mrs. Josephine Pride by appointment of the probate court of Kane County. By a later proceeding in said court Mrs. Pride was restored to the full control of her property and the conservatorship of Mrs. Westgate was terminated and she was directed to file a final report. She filed such a report and charged herself with a total estate of $574.68 and credited herself with disbursements and with an amount for services, making a total of $574.68, leaving no estate for her ward. Mrs. Pride filed objections to each item of disbursements in said report. Certain items were allowed and certain items disallowed and the amount of the charges was reduced by the sum of $342.05, which Mrs. Westgate was ordered to pay to Mrs. Pride. Mrs. Westgate appealed to the circuit court, where there was a hearing and the circuit court allowed and disallowed the same items as the probate court and entered a judgment in favor of Mrs. Pride and against Mrs. Westgate for $342.05, from which Mrs. Westgate prosecutes this appeal.

The powers and duties of a conservator are given in Chapter 68 of the Revised Statutes, from section 17 on. Section 17 is as follows:

> "The conservator shall manage the estate of his ward frugally and without waste, and apply the income and profit thereof, so far as the same may be necessary, to the comfort and suitable support of his ward and his family, and the education of his children."

Mrs. Pride was old and apparently difficult to manage. Mrs. Westgate found it difficult to get any one to stay and take care

Josephine Pride, appellee,

vs.

Appeal from Linn.

Smith v. Pardee, appellant.

Adams, J.

Mrs. Smith's husband was guardian of the person and estate of Mrs. Josephine Pride by appointment of the probate court of Linn County. By a later proceeding in that court Mrs. Smith was restored to the full control of her property and the guardianship of Mrs. Smith's husband was terminated and the case dismissed by this a final report. The final report showed a balance of $574.68 and with a total outlay of $574.68 and a credit for disbursements and with an amount for services, making a total of $574.68, leaving no cash for her use. Mrs. Smith filed objections to each item of disbursements in a lengthy report. Certain items were allowed and certain items disallowed and the amount of the charges was reduced by the sum of $[illegible], which the guardian was ordered to pay to Mrs. Smith. Mrs. Smith appealed to the circuit court, where upon a hearing the trial court court allowed and disallowed the same items as the probate court and entered a judgment in favor of Mrs. Smith for the balance for $[illegible].05, from which Mrs. Smith's guardian appealed.

The powers and duties of a guardian are [illegible] in Section 68 of the Revised Statutes, from section 17 of [illegible] as follows:

> The guardian shall manage the estate of his ward frugally and without waste, and apply the income and profits thereof, so far as the same may be necessary, to the comfort and suitable support of his ward and his family, and the education of his children.

Mrs. Smith was old and necessarily difficult to manage. [illegible] Guardian found it difficult to get her one to stay and take care

of her. Mrs. Pride had lived with her daughter many years and the daughter had died and at the request of some member of the family, Mrs. Westgate became conservator. After experiencing difficulty in getting any one to remain permanently with Mrs. Pride, Mrs. Westgate applied to the supervisor, a superintendent of an old women's home and others without success. She then decided to seek to have her declared insane and sent to the insane asylum. She employed an attorney, consulted numerous physicians, and instituted proceedings in the county court to have that end accomplished. A defense was interposed in behalf of Mrs. Pride and that effort was abandoned. Mrs. Pride then applied to the probate court to have the conservatorship ended and to be restored to the control of her own property. That case was tried, apparently before a jury, and the verdict and the judgment were that Mrs. Pride was competent to manage her own affairs and that the conservatorship should be discontinued. Most of the items rejected by the courts below were incurred and paid by Mrs. Westgate in fighting Mrs. Pride in the proceedings just stated. She called a number of medical men as experts and paid them special fees for their services in court. She paid the fees of numerous witnesses. She paid a lawyer $200.00 for his services. According to her own evidence, she spent much time for these legal contests. She also paid various sheriff's fees which apparently were for service of subpoenas upon her witnesses. The courts below rejected all items of sheriff's fees, witnesses' fees and expert's fees, and sums paid by her for conveying Mrs. Pride to the court house. Her attorney had done some work for her not of the character above stated. A creditor had levied an attachment upon furniture which Mrs. Pride claimed had been given to her by her daughter. Mrs. Westgate's attorney brought replevin and regained that furniture. The attorney drew her final report and a previous report. The courts below allowed $50.00 for his fees. This was we think a

of her. Mrs. Pride had lived with her daughter many years and the daughter had died and at the request of some member of the family, Mrs. Hastgate became conservator. After experiencing difficulty in getting any one to remain permanently with Mrs. Pride, Mrs. Hastgate applied to the supervisor, a respectable-out of an old women's home and others without success. She then decided to need to have her declared insane and went to the insane asylum. She employed an attorney, committed numerous physicians, and instituted proceedings in the county court to have that end accomplished. A defense was interposed in behalf of Mrs. Pride and that effort was abandoned. Mrs. Pride then applied to the probate court to have the conservatorship ended and to be restored to the control of her own property. That case was tried, apparently before a jury, and the verdict and the judgment were that Mrs. Pride was competent to manage her own affairs and that the conservatorship should be discontinued. Most of the items rejected by the courts below were incurred and paid by Mrs. Hastgate in fighting Mrs. Pride in the proceedings just stated. She called a number of medical men as experts and paid them special fees for their services in court. She paid the fees of numerous witnesses. She paid a lawyer $800.00 for his services. According to her own evidence, she spent much time for these legal contests. She also paid another lawyer a fee which currently was for services of conformance as an attorney. She further claim to have paid all items of sheriff's fees, witnesses' fees and counsel's fees, and some paid by her for conveying Mrs. Pride to the county house. Her attorney had done some work for her out of the conservatorship stated. A creditor had levied an attachment upon furniture belonging Mrs. Pride claimed had been given to her by her daughter. Mrs. Hastgate's attorney brought replevin to recover such furniture. The attorney for her filed report and a previous report. The courts below allowed $80.00 for his fees. There was no claim a

fair allowance for that for which the conservator had a right to employ him at the expense of this estate. The court disallowed Mrs. Westgate's charge for her services. We are of the opinion that the conservator mis-conceived her duty. In all that she did she had no orders from any court directing or authorizing her to take such action. She incurred considerable of these expenses in endeavoring to have her ward declared insane and sent to the insane asylum. The fact that that attempt was abandoned tends to show that the position was not well founded. When the ward sought to be restored to the control of her own property, the conservator resisted with great energy and most of these expenses were incurred in that resistance. We are of the opinion that under the circumstances here shown the conservator had no right to use up the meagre moneyoff this estate in an effort to prevent the ward from being restored to the control of her own property. Itis not shown what judgment for costs, if any, was rendered. It is not shown that she was ordered as conservator to pay those costs and expenses. Apparently she paid most of them after her conservatorship had ended. We are of opinion that no reason is shown to justify the conservator in paying these moneys out of her ward's estate. In her report she asked to be allowed $128.46 for her compensation. There are several reasons why the rejection of this item cannot be disturbed. There is evidence by the conservator herself and by others that Mrs. Westgate agreed with the court appointing her that she would make no charges for her services but would treat it as a matter of charity. Mrs. Westgate seeks to show that these statements were on condition that the litigation was stopped, but other witnesses did not so understand it. She made a former report which is not in this record and we do not know but she was allowed compensation in that report. She did not itemize her services or show what would be a reasonable compensation to her for the things which she properly did for her ward. It is obvious

their allowance for that for which the conservator had a right to employ him at the expense of this estate. The court disallowed Mrs. Vaughn's claims for her services. We are of the opinion that the conservator mis-conceived her duty. In all that she did she had no orders from any court directing or authorizing her in such work. The learned conservatrix of these expenses in endeavoring to have her ward declared insane and sent to the insane asylum. The fact that that attempt was abandoned tends to show that the position was not well founded. When the ward sought to be restored to the control of her own property, the conservator retained with great energy and most of these expenses were incurred in that tendency. We are of the opinion that the conservatrix had no right to use up the income of this estate in an effort to prevent the ward from being restored to the control of her own property. This not shown what payment for years, if any, was rendered. It is not shown that she was ordered as conservator to pay those costs and expenses. Apparently she paid most of them after her conservatorship had ended. We are of opinion that no reason is shown to justify the conservatrix in giving these sums out of her ward's estate. In her report she asks to be allowed $1000.00 for her compensation. There are several reasons why the payment of this item should be disapproved. There is evidence by the conservator herself and by others that Mrs. Vaughn agreed with the court appointing her that she would make no charges for her services but would treat it as a matter of charity. Mrs. Vaughn asks to show that there statements were so misleading that the litigation was stopped, but other witnesses did not so understand it. The task a former report which is not in this record and we do not know but she was allowed compensation in that report. She did not therefore her view or that what would be a reasonable compensation to her for the things which she properly did for her ward. It is obvious

that she ought not to be paid for her efforts to send her ward to the insane asylum or to resist returning the property to the control of her ward. The proof furnished no basis on which any definite sum could be rejected and some other sum allowed to her for her services.

The judgment of the court below is therefore affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 13th day of March in the year of our Lord one thousand nine hundred and twenty-two

Justus L. Johnson

Clerk of the Appellate Court.

2125a 7042 (2136a

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-one, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

7042

James Rush Cowper, appellee,)
)
vs.) Appeal from Knox.
)
F. W. Holliday, appellant,)

224 I.A. 623

DIBELL, P.J.

All printed papers filed in this case by either party have reversed the titel of this cause, which should be as above. Section 99 of the Practice Act.

Cowper filed a bill for equitable relief against Holliday. The latter filed a special demurrer to the bill. The demurrer was overruled Holiday elected to stand by his demurrer and prayed an appeal to this court from said order. The appeal was granted and perfected. The only error assigned is the overruling of the demurrer. This was not a final order No decree had been entered in the court below. With certain exceptions, such as are provided by Section 123 of the Practice Act, appeals only lie from final judgments, orders and decrees. Section 91 of the Practice Act. An appeal does not lie from the order here complained of. The appeal is therefore dismissed, with leave to each party to withdraw all papers filed by him.

Appeal dismissed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court at Ottawa, this 13th day of March in the year of our Lord one thousand nine hundred and twenty-two

Justus L. Johnson
Clerk of the Appellate Court.

212a

6851

2137a

R H granted May 5, 1921.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-one, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

224 I.A. 624

BE IT REMEMBERED, that afterwards, to-wit: on the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6851 Agenda No. 68

Paul Swanlund, appellant,)
vs.) Appeal from Winnebago
Rockford & Interurban Railway)
Company, appellee,)

JONES, J.

224 I.A. 624

This suit was commenced by the appellant, Paul R. Swanlund in the Circuit Court of Winnebago County against the appellee the Rockford & Interurban Railway Company to recover damages for personal injuries suffered on account of alleged negligence on the part of the appellee's employees in the operation of an interurban car. It appears from the evidence that on July 28, 1917 at about 6:40 A.M., the appellant was riding on Tenth Street in the City of Rockford in a side car attached to a motorcycle owned by and driven by one Ludwig Engdahl. Appellee's interurban line is located on Fifty Avenue which intersects Tenth Street at right angles. Appellant and Engdahl were going south towards Fifty Avenue on their way to Camp Grant. At the same time an interurban car belonging to appellee was going west on Fifth Avenue toward Tenth Street. The mororcycle and the interurban car collided at the crossing. The appellant was thrown out of the side car of the motor cycle upon the ground and injured severely.

The declaration charges that the appellee's servants carelessly and negligently managed its car at the time of the collision; that the motor man did not sound an alarm bell as the car approached the crossing as required by an ordinance of the City of Rockford; and that the car was running at a greater rate of speed than fifteen miles an hour within the city limits in violation of the ordinances of the city. There was a trial which resulted in a verdict finding the appellee not guilty. Judgment was rendered upon the verdict and this appeal is prosecuted from the judgment.

A number of questions are raised on the appeal concerning rulings of the court on evidence and in reference to the giving and refusal of instructions. The record does not disclose any reversible error in the admission or exclusion of evidence. Complaint is made that refused instruction No. 1 should have been given and was improperly refused. We are of opinion that the instruction was properly refused because it does not correctly state the duty of the appellee in the control and operation of the inter-urban car in question and also it entirely ignores the question of negligence in the driver of the motorcycle. Refused instruction No. 2 contained matters which were fully covered by other instructions given for appellant. Refused instruction No. 3 was properly refused because it ignores the reciprocal rights of the parties to use the street in question and would have been prejudicial to appellee, if given.

Complaint is also made of the giving of instruction No. 3 for the appellee. This instruction contains general propositions of law and because of its general nature might well have been refused; still we are of the opinion that there was no reversible error in giving it.

It is contended that given instruction No. 4 for the appellee was misleading. The instruction states that if the injury in question was caused by the combined negligence of the appellant and the driver of the motorcycle or solely by the negligence of the driver of the motorcycle, then in either event the appellant could not recover. It is insisted that the words "and not by the negligence of the defendant" should have been added to make the instruction clear. We are of opinion that the instruction as it was given correctly stated the law without the additional words.

Instruction No. 5 given at the request of appellee is complained of because it told the jury that if they believed from the evidence the driver of the motorcycle was negligent in the way he operated and drove the same and that such negligence was the sole

A number of questions are raised on the [illegible] rulings of the court on evidence and in reference to the giving and refusal of instructions. The record [illegible] reversible error in the admission or rejection of evidence. Complaint is made that refused instruction No. 1 should have been given and was improperly refused. We are of opinion that the instruction was properly refused because it does not correctly state the duty of the appellee in the control and operation of the inter-urban car as it passed and also it entirely ignores the question of negligence in the driver of the motorcycle. Refused instruction No. 2 [illegible] additional matters which were fully covered by other instructions given for appellants. Refused instruction No. 3 was properly refused because it ignores the reciprocal rights of the parties to use the [illegible] appellee, if any.

Complaint is also made of the giving of instruction No. [illegible] for the appellee. This instruction contains a [illegible] statement of law and because of its general nature might well have been refused; still we are of the opinion that there was no reversible error in giving it.

It is contended that given instruction No. [illegible] for the appellee was misleading. The instruction told the jury that if the injury in question was caused by the [illegible] negligence of the driver of the motorcycle or [illegible] the negligence of the driver of the motorcycle, then in [illegible] the appellant could not recover. It is insisted that [illegible] the negligence of the "chauffeur" should have been [illegible] the instruction [illegible] of opinion that the [illegible] was given correctly states the law [illegible] given.

Instruction No. 5 given at the request of appellee is complained of because it told the jury that if they believed from the evidence the driver of the motorcycle was negligent in the way he operated and drove the [illegible], that such negligence was [illegible]

cause of the collision, and injury to plaintiff, then plaintiff could not recover. It further told the jury that the negligence (if any) of the driver of the motorcycle could not be imputed to the defendant company. There was no claim made in the case that the appellee was negligent through the driver of the motor cycle and that the instruction so far as it related to imputed negligence of appellee was therefore outside of any issue which had arisen in the case. While we are inclined to think that the instruction is subject to criticism, but we are of the opinion that under the circumstances here presented there was no reversible error in giving it. (Frechett vs. Ill. Cent. Ry. Co. 197 Ill. App. 213, 225.)

Instruction No. 8 is to the effect that if the jury believe from the evidence that the collision in question was causes solely by the driver of the motorcycle carelessly and negligently driving the motorcycle upon the interurban tracks in question, then there could be no recovery. The criticism made of this instruction is that it assumes the driver's carelessness and negligence in driving on the interurban tracks and merely leaves to the jury the question whether this was the sole cause of the injury to the appellant. In view of all the instructions in the case we think the question of negligence of the driver of the motorcycle was fairly left th the jury and that the jury could not have been mislead by this instruction.

Instruction No. 15 told the jury "That in cases of this nature the mere fact of the collision itself having happened standing alone is not any evidence of the negligence on the part of the Rockford and Interurban Railway Company". Inasmuch as the mere fact that the collision happened, did not stand alone in the case, there was no occasion to give this instruction and it should have been refused but we think the appellant was not prejudiced thereby. The record in this case discloses that the main issue was whether the appellant was guilty of contributory negligence

cause of the collision, and [illegible] to [illegible], the [illegible]
[illegible] (Illinois [illegible]). The [illegible]
(if any) of the driver of the [illegible] [illegible]
to the defendant company. There was no [illegible]
that the appellee was negligent in the way he [illegible]
cycle and that the instruction so [illegible] it [illegible]
negligence of appellee was therefore [illegible] [illegible]
had arisen in the case. [illegible] instructions [illegible]
instruction in question to additions, [illegible]
that under the circumstances here [illegible]
error in giving it. (Rockford [illegible], [illegible] [illegible]
[illegible], [illegible].

[illegible] No. 2 is to the effect that if the jury [illegible]
from the evidence that the collision [illegible]
by the driver of the automobile [illegible]
the negligence upon the instructions [illegible] [illegible], [illegible]
would be no recovery. The criticism made of this instruction is
that it assumes the driver's contributory negligence [illegible]
[illegible] [illegible] [illegible] [illegible]
question whether this was the [illegible] [illegible] [illegible]
appellant. In view of all the instructions [illegible]
the question of negligence [illegible]
[illegible] left to the jury [illegible]
[illegible] [illegible].

Instruction No. 11 told the jury [illegible]
the duty of the motorist to [illegible]
[illegible] [illegible] [illegible] [illegible]
roadbed and [illegible] [illegible] [illegible]
fact that the collision occurred, [illegible]
[illegible], [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible]

by his own failure to look out for or listen for the approach of the interurban car as they were nearing the crossing at Fifth Avenue, and by the like negligence of the driver of the motorcycle which should be imputed to him because of his failure to warn the driver. There is evidence to show that the motorcycle was running at a very rapid rate of speed. The plaintiff testified in the case. His testimony discloses that Engdahl was between him and the car and that he was willing to rely upon Engdahl's driving without cautioning him to look out for the car. Paul Kraker, a witness for appellee, testified that he was a passenger on the interurban car and happened to look down Tenth Street just before the car reached the crossing; that he saw the motorcycle coming down Tenth Street and also saw the occupants of the car; that when he looked the motorcycle was about 150 feet from the crossing; that at that time the driver was talking to the man in the side car and looking at him, and that both men were in conversation as they were coming down Tenth Street. This evidence considered in connection with other evidence in the case warranted the jury in the conclusion that the driver of the motor cycle was directing his attention to the appellant and that the appellant was directing his attention to the driver instead of looking or listening for the approach of the interurban car; and that the appellant was guilty of contributory negligence both by his own failure to use due care and by the negligence of the driver of the motorcycle imputed to him.

We find no reversible error in the case; and the judgment is therefore affirmed.

[illegible]

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 13th day of March in the year of our Lord one thousand nine hundred and twenty-two

Justus L. Johnson

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-one, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

224 I.A. 624

BE IT REMEMBERED, that afterwards, to-wit: on the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6877 Agenda No. 2.

Everett B. Thomas, appellee,)
)
vs.) Appeal County Court Peoria
)
Peoria Railway Co., appellant,)

224 I.A. 624

JONES, J.

This is a suit by the plaintiff for the recovery of damages to an automobile owned by the plaintiff which was struck by a street car owned and operated by the defendant, on Main Street in Peoria. The accident occurred at the intersection of an alley ~~in~~ with Main Street between Monroe and Perry Streets. There was judgment for the plaintiff in the sum of $423.50 which appellant insists is excessive and not warranted by the evidence. Appellant also contends that the negligence of the defendant was not established.

The bill of exceptions in this case contains no motion for a new trial. The clerk of the trial court inserted what purports to be a motion for a new trial in the record. Inasmuch as the contentions of the appellant are based solely on questions of fact, it is necessary that the bill of exceptions should contain a motion for a new trial; otherwise, this court cannot review such questions.

Geary vs. Bangs, 138 Ill. 77.

Guth vs. Haas, 210 Ill. App. 437.

Mac Neel vs. Eisendrath, 195 Ill. App. 20.

Because the questions raised are not open to review by this court the judgment of the trial court must be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-

Clerk of the Appellate Court.

2127a

6904

2139a

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-one, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

224 I.A. 624

BE IT REMEMBERED, that afterwards, to-wit: on the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6904 Agenda No. 10

Callaghan & Co., appellee,)
vs.) Appeal from Iroquois
C. H. Payson, appellant,)

224 I.A. 624

JONES, J.

This is an action in assumpsit instituted by Callaghan & Co. as plaintiff against the defendant, Payson, who is the appellant here. Judgment was rendered by the justice of the peace in favor of the plaintiff and against the defendant. An appeal to the Circuit Court of Iroquois County was taken by the defendant and a trial was there had before the court, a jury having been waived by agreement of the parties. This trial resulted in a judgment in favor of the plaintiff and against the defendant for $72.60 together with costs. The judgment was entered on November 18th, 1919. Thereafter certain motions to apportion and retax costs were made and disposed of and later the defendant entered his motion to set aside the judgment. This motion was denied by the court and defendant then entered his motion in arrest of judgment on the ground that there is no proper plaintiff in whose name and behalf a judgment can be or may be lawfully entered. This motion was overruled by the court.

The only errors assigned are upon the rulings of the court in refusing to set aside the judgment and in denying the motion in arrest of judgment.

We think the court's rulings were proper and in accordance with the law. If "Callaghan & Co." is a co-partnership and not a corporation the question of the right to sue under the name of "Callaghan & Co." should have been pleaded at the proper time. The question of the capacity of plaintiff to sue by that name was in no manner raised until after the entry of judgment. This was too late and such objection could not be raised either by a motion to set aside the judgment or by a motion in arrest of judgment.

Gen. No. 6904 Calendar No. 10

Gallagher & Co., appellees,
vs.
C. E. Payson, appellant,

} Appeal from Kankakee.

June, 1.

This is an action in assumpsit instituted by [illegible] as plaintiff against the defendant, Payson, who is the [illegible] here. Judgment was rendered by the justice of the peace in favor of the plaintiff and against the defendant. An appeal to the circuit court of Kankakee county was taken, [illegible] and a trial had before the court, a jury being [illegible] waived by agreement of the parties. The court rendered judgment in favor of the plaintiff and against the defendant for $72.00 together with costs. The judgment was entered [illegible] 1897. Thereafter [illegible] costs were made and discharged of and later the defendant filed his motion to set aside the judgment. The motion was denied by the court and defendant then entered his appeal from the judgment of the court which [illegible] in no order granting [illegible] name was [illegible] judgment [illegible] by the [illegible] This motion was overruled by the court.

The only errors assigned are that the judge [illegible] in refusing to set aside the judgment and in [illegible] the [illegible] in favor of judgment.

We think the court [illegible] with the law. It is [illegible] a correction the judgment of the court [illegible] of "Gallagher & Co." [illegible] The question of the sufficiency of [illegible] was in no manner raised with the [illegible] was too late and such objection could not be raised either in a [illegible] to set aside the judgment or by a motion in arrest of

In Glos vs. Patterson 204 Ill. 540, it is said that, it is a general rule that nonjoinder of defendants can only be availed of by plea where the defect does not appear on the face of plaintiff's pleading, and that in the absence of such plea the objection will be deemed as waived.

In this case no objection was raised by plea.

The effect of failure to set up the defense, if it existed, operates as a waiver of the objection. (Ency. Pleading and practice, Vol. 15, 756; 31 Cyc. 738). Generally speaking a judgment will not be arrested on account of any matter which defendant might have pleaded and relied on as a defense to the action, whether by plea in bar or in abatement. The objection that there is a defect of parties is waived by going to trial without objection and cannot, therefore, be raised by motion in arrest of judgment.(23 Cyc. 826).

The record in this case contains no bill of exceptions and without it, the court's refusal to set aside the judgment upon appellant's motion can not now be reviewed.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 13th day of March in the year of our Lord one thousand nine hundred and twenty-two

Justus L. Johnson

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-one, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6905 Agenda No. 11

Edward W. Riley, appellee)
)
vs.) Appeal from Lake
)
August Felgenhauer and)
William Leonard,)
appellants,)

224 I.A. 624

JONES, J.

The appellee, Riley, was on April 1st, 1918 the owner of a certain farm. On said date he leased the farm to the appellant Felgenhauer, and a written lease between the parties was entered into. On the same day Felgenhauer purchased from Riley certain chattels to be used in and about the business of conducting the farm. In consideration of the purchase price of such chattels Felgenhauer executed and delivered to Riley his promissory note for $2482.00 payable two years after date with interest thereon at the rate of five per cent per annum until paid. William Leonard, the father-in-law of Felgenhauer signed the note as surety. Thereafter $1000.00 and all interest due to April 1st, 1919 was paid by Felgenhauer and the payments were duly credited upon the note.

About November 1st, 1919 Felgenhauer with the consent of appellee determined to surrender his lease and he and appellee made some attempt at a settlement of all accounts between them. It is insisted by Felgenhauer that during the negotiations for a settlement he sold to Riley the young stock on the premises for $140.00 and that this sum was to be applied upon the note. This is denied by Riley. It is not contended, however, that any final settlement was made between the parties upon this occasion but afterwards, according to the contention of appellants, Mrs. Felgenhauer, the wife of appellant acting for her husband met Riley in a garage at Barrington where they undertook to settle all accounts. They agreed as to a number of items but before a complete and final settlement was made a dispute between them

Gen. No. 6905 Docket No. 11

Edward W. Riley, appellee)
)
vs.) Appeal from ...
)
August Felgenhauer and)
William Leonard,)
appellees.)

224 Ill. App. 524

Abstract.

The appellee, Riley, was on April 1st, 1918, the owner of a certain farm. On said date he leased the farm to the appellant Felgenhauer, and a written lease between the parties was entered into. [illegible] certain chattels to be used in the event the business of operating the farm. In consideration of the written lease of farm chattels Felgenhauer executed and delivered to Riley his promissory note for $2480.00 payable two years after date with interest thereon at the rate of five per cent per annum. William Leonard, the father-in-law of Felgenhauer, was a surety. Thereafter $1000.00 on April 1st, 1919, was paid by Felgenhauer and the [illegible] upon the note.

About November 1st, 1919 [illegible] appellee determined to [illegible] made some attempt at a settlement of all [illegible] It is insisted by Felgenhauer that [illegible] settlement he sold to Riley [illegible] $140.00 and that this was [illegible] is denied by Riley. It is not [illegible] settlement was made between the parties [illegible] afterwards, according to the contention of [illegible] Felgenhauer, the wife of [illegible] Riley in a garage at [illegible] all accounts. They agreed to [illegible] complete and final settlement was made [illegible]

arose over Felgenhauer's liability to pay Riley for certain cows that had died. This dispute broke off negotiations and nothing further thereafter was ever done looking toward a settlement.

Sometime after the note had become due appellee left it with the Bank of Barrington for collection. The Bank notified appellants who called upon the cashier and asked him to compute the amount due on the note according to their contentions. The cashier made such computations pursuant to the directions of appellants and by so doing the appellants determined that there was due from Felgenhauer to Riley the sum of $1278.46. This amount was left with the cashier with instructions to pay the same to Riley in full settlement. Riley refused to accept this amount on the grounds that it was less than the sum due him.

On June 28, 1920, appellee caused a judgment by confession to be entered against the defendants on the note in the Circuit Court of Lake County. On July 12, 1920, appellants, appeared in open court by their attorneys and moved the court "to vacate and set aside the judgment rendered by confession" and for leave to plead. On September 7, 1920, the court entered an order that said motion be allowed and that "said judgment opened up and the execution issued thereon stayed and that said judgment stand as a lien". Leave was given defendants to plead within thirty days. Under this leave a plea of the general issue and three special pleas were filed. The special pleas averred that a settlement between the parties had been made whereby a claim of $295.59 was to be allowed Felgenhauer and was to be indorsed upon the note and also alleging a tender of said amount. All the pleas were verified. By agreement of parties a trial by jury was waived and the cause was tried by the court on September 7th, 1920. After hearing the evidence the court found the issues for the appellee and that there was

arose over Felgenhauer's liability to pay Riley for certain cows that had died. This dispute broke out repeatedly and nothing further thereafter was ever done looking toward a settlement.

Sometime after the note had become due Riley left it with the bank of Barrington for collection. The bank notified appellants who called upon the cashier and asked him to inform the amount due on the note according to their contention. The cashier made such computations upon it as the appellants and by so doing the cashier contended that there was due from Felgenhauer to Riley the sum of $[illegible]. That amount was left with the cashier with instructions to pay the same to Riley in full settlement. Riley refused to accept the [illegible] on the ground that it was less than the [illegible] him.

On June 28, 1920, appellee caused a judgment by confession to be entered against the defendants [illegible] in the [illegible] Court of Lake County. On July 15, 1920, [illegible], in open court by their attorneys [illegible] and set aside the judgment rendered by confession [illegible] leave to plead. On September 7, 1920, the court [illegible] order that said motion be filed [illegible] opened up and the execution issued on said judgment quashed as a [illegible] to plead within thirty days. [illegible] general issue and three special [illegible] filed. [illegible] filed another [illegible] and was to be injured upon the [illegible] of said amount. [illegible] parties a trial by jury was waived and the cause was tried in the court on September 7th, 1922. After hearing the evidence the court found the issues for the appellee and that [illegible]

due him from the defendants $1728.40 together with interest thereon from June 28, 1920. The above mentioned sum included $150 for plaintiffs attorney's fee. Appellants interposed a motion for a new trial which was overruled by the court and also a motion in arrest of judgment which was likewise overruled by the court. Thereupon judgment was entered in favor of appellee and against defendants upon the aforesaid findings. From this judgment appellant prayed an appeal.

Later and on September 21, 1920 the defendants submitted to the court certain propositions of law some of which were marked by the court "held" and others were marked "refused." On the next day, to-wit, September 22, 1920, the court entered an order nunc pro tunc as of July 12, 1920 and also an order nunc pro tunc as of September 7, 1920. These orders are in most respects substantially the same as the original orders except that the order of July 12, 1920 is made to recite that the motion to vacate and set aside said judgment is denied instead of allowed as it appeared in the order as it was originally entered. However, both the original order and the nunc pro tunc order recite that the motion to open up the judgment is allowed and that it shall stand as a lien.

It is apparent that the purpose of the court in entering its nunc pro tunc orders was to clarify a situation which had arisen because of the recital of the order of July 12, 1920, that the motion to vacate and set aside the judgment was allowed. Whether the effect of the order of July 12, was to open up the judgment or to set aside and vacate it becomes material because of the allowance of appellee's attorney's fees in the judgment of June 28. If the judgment was opened up and not vacated then by reason of the Court's subsequent orders such judgment by confession was confirmed and ratified in all respects including the allowance of attorneys fees. But if the judgment was vacated and set aside by the order of July 12, then such allowance of

due him from his [illegible] [illegible] [illegible] [illegible]
thereon from June 4, 1940. The above mentioned [illegible]
$130 for plaintiffs attorney's fee. [illegible] [illegible]
motion for a new trial which was overruled [illegible] the same [illegible]
a motion in arrest of judgment which was likewise overruled [illegible]
the court. Thereupon judgment was entered in favor of [illegible]
and against defendants upon the [illegible] [illegible]
[illegible]

[illegible] the court certain propositions of law some of which [illegible]
by the court "hold" and others were [illegible] "refuse." [illegible]
next day, to-wit, September 20, 1940, the court [illegible]
same pro tunc as of July 18, 1940 and [illegible] [illegible]
tunc as of September 7, 1940. These orders [illegible] [illegible]
substantially the same as the original order except that the
order of July 18, 1940 is made to read that the motion to
vacate and set aside said judgment is denied [illegible] [illegible]
as it appeared in the order as it was originally entered. [illegible]
[illegible], both the original order and the nunc pro tunc orders [illegible]
that the motion to open up the judgment be [illegible] [illegible] [illegible]
shall stand as a lien.

It is apparent that the records of the court in [illegible]
its nunc pro tunc orders are to clarify [illegible] [illegible]
arisen because of the recital of the order of [illegible]
that the motion to vacate and set aside the judgment [illegible]
whether the effect of the order of July 18, [illegible] [illegible]
judgment or to set aside and vacate it [illegible] [illegible]
of the allowance of a judgment [illegible] [illegible]
[illegible] [illegible] [illegible]
[illegible] [illegible] [illegible]
[illegible] [illegible] [illegible]
[illegible] [illegible] [illegible]
[illegible] [illegible] [illegible]

attorney's fees was likewise set aside and the final judgment for $1728.40 is excessive to the extent of such attorney's fees. There was no provision in the note for the allowance of attorney's fees except in the warrant for confession. If the judgment by confession was set aside and vacated, then the cause of action would be in the same state as any ordinary action by summons. (Borchenius vs. Canutson 100 Ill. 82.) And as there was no provision in the note for attorney's fees in case of a trial on the merits it would have been improper to allow attorneys fees after the judgment had been set aside. Under the plain terms of the note in question, such fees could only be allowed if judgment be entered by confession, and not otherwise. (Morrison Hotel and Restaurant Company vs. Kirsner et al., 245 Ill. 431)

We have carefully examined the record in this case and we are of the opinion that the effect of the order of July 12 was not to set aside and vacate the judgment by confession but merely to open up the judgment for the purpose of permitting the appellants to plead to the merits. It seems from the record that the distinction between opening up a judgment by confession and vacating it was unobserved. It is true that the order of July 12 provides that the motion to vacate and set aside the judgment be allowed, yet it further provides that the judgment shall stand as a lien. It is evident from this that the court intended not to vacate and set aside the judgment but to open it up for the purpose of permitting a defense. If the judgment were vacated and set aside then, there is nothing to stand as a lien. It could stand as a lien only when it is opened up. Therefore, we are constrained to take the view that the order must be interpreted as opening up the judgment and not as vacating it.

If our view is correct then the order of September 7th and the nunc pro tunc orders had the effect of confirming the judgment by confession as to principal and interest due on the

note together with attorney's fees.

The propositions of law were not submitted to the court until fourteen days after the trial and judgment on the merits. The rulings of the court in holding or refusing such propositions when made after final judgment has been entered, can not be assigned as error. (Allman vs. Lumsden 159 Ill. 219.) Propositions of law can serve no useful purpose either to the court or to parties litigant unless they are submitted before final judgment. The object of the law in permitting the submission of such propositions is to place squarely before the court in ddfinite and precise form the law which the party submitting them contends is controlling in the case. When this is done the court is properly advised of the party's position. If the propositions are not submitted until after the court has acted in entering final judgment, the court is without the benefit which it would have otherwise derived from an apt and timely submission thereof. As was said in Allman vs. Lumsden, supra, "If they can be submitted at any time after such final decision they would not only cease to serve any useful purpose, but would become a hindrance, rather than an aid, to the speedy administration of justice." The fact that these propositions of law were actually passed upon by the court does not alter the case nor is the rule any less applicable simply because the nunc pro tunc orders above referred to were entered the day after the propositions were so submitted. The real judgment on the merits in this case was entered on September 7th and the nunc pro tunc orders entered September 22nd ~~and~~ were as we have stated merely for the purpose of clarifying a situation which had arisen because of the inappropriate use of certain words in the order of July 12.

It is contended by appellants that the court erred in refusing to admit the lease in evidence, and that such refusal deprived them of the right to offer evidence concerning certain items of credit which they claim should have been allowed because

of matters growing out of such lease. We do not agree with their contention in this regard. The proofs offered upon the hearing conclusively show that although the lease and the note were executed upon the same day they had no essential relationship. They had no such connection as would make them parts of the same transaction. Neither depended upon the other in any respect. No plea of set off was filed and the matters sought to be shown by appellants as arising under the lease could not be shown by way of recoupment. Therefore, the ruling of the court in excluding the lease was correct.

We are of the opinion that the court committed no error upon the trial either in the exclusion of proper evidence or in the admission of improper evidence. The judgment is therefore affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 13th day of March in the year of our Lord one thousand nine hundred and twenty-two

Justus L. Johnson
Clerk of the Appellate Court.

6912

2141a

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-one, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

224 I.A. 624

BE IT REMEMBERED, that afterwards, to-wit: on the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6912 Agenda No. 17

Ward L. Candor, et al, appellants,

vs.

Community Consolidated School District Number 115, Mercer County, Illinois, et al., appellees,

Appeal from Mercer.

JONES, J.

224 I.A. 624

On April 3, 1920 the appellants filed their bill of complaint attacking the organization of the school district and praying that an injunction be granted restraining the said school district and the other defendants and each of them from assessing the lands and property of complainants or making a tax levy upon their lands and from issuing or selling any bonds which would be a lien upon their taxable property and from extending any tax upon the tax books of Mercer County against their property for the benefit of said school district and from doing any other act under or by virtue of the statute of the State of Illinois known as "Community Consolidated School District Act". The bill also prays that the said statute shall be declared null and void and also for general relief. On May 29, 1920 a temporaty injunction was granted restraining the defendants from levying taxes and from doing any act under the so-called Community Consolidated School District Act as prayed in the bill.

On June 19, 1920, in vacation after the April Term of the Circuit Court of Mercer County, the temporary injunction was dissolved upon motion of defendants. No appeal was taken from the order dissolving the temporary injunction.

At the September Term 1920 of the Circuit Court of said County, a suggestion of damages was made by defendants for the wrongful suing out of the temporary injunction. Upon a hearing after due notice the court entered a decree ordering

Gen. No. 6912

Ward L. Gamble, et al,
appellees,

vs.

Community Consolidated Grade
District Number 118, Lawrence
County, Illinois, et al.,
appellees.

JOHNS, J.

On April 6, 1920 the appellees filed their bill in complaint attacking the organization of the school district and praying that an injunction be granted restraining the school district and the other defendants and each of them from using the funds and property of consolidated or combined school districts from any from taxing or assessing [illegible] would be a lien upon their taxable property [illegible] any tax upon the tax books of Lawrence County [illegible] for the benefit of said school district and from acting [illegible] act under or by virtue of the [illegible] known as "Community Consolidated School District [illegible]" [illegible] also prays that the said statute [illegible] and also for general notice. On [illegible], 1920 [illegible] tion was granted restraining the [illegible] and from doing any act under the [illegible] School District [illegible] in the bill.

On June 19, 1920, in vacation after [illegible] Circuit Court of Lawrence County, [illegible] dissolved upon motion of defendants. [illegible] the order dissolving the [illegible] injunction.

At the September term 1920 of the Circuit Court of [illegible] County, a suggestion of damages was made by defendants [illegible] the wrongful suing out of the temporary injunction. [illegible] hearing after due notice the court entered a decree [illegible]

and adjudging the complainants to pay the sum of $250.00 as damages.

Although the court's action in dissolving the temporary injunction is assigned as error, it is conceded that this court has no jurisdiction to pass upon the constitutionality of the so-called Community Consolidated School District Act. Aside from our lack of jurisdiction to pass upon this question, we have no power in this case to review any question raised upon the motion to dissolve the injunction or the court's ruling thereon. No appeal was taken from that order. The appeal which is attempted to be prosecuted here is from the order of the court assessing damages against appellants and that question is the only question open to us on review.

Under the circumstances disclosed by the record in this case, we think the assessment of damages in the sum of $250.00 against appellants was both reasonable and just. Whatever insufficiency there may have been in the testimony of the witnesses who were sworn and examined on the question of attorney's fees and whatever objections might reasonably have been made as to the qualifications of the witnesses who testified in this case, the assessment of damages should not be disturbed on that account. It is a well settled rule of law that where the value of the services of an attorney is the matter in issue, the court not only may but should call upon his own knowledge, experience and judgment as to the value of legal services rendered in the particular case and his judgment will not be reviewed on appeal unless clearly and manifestly against the weight of evidence. (Chicago Wire Chair Co. vs. Kennedy & Wright Co. 141 Ill. App. 196; Hess vs. Killebrew, 209 Ill. 193; Lee vs. Lomax 219 Ill. 218.) The decree is, therefore, affirmed.

and adjudging the complainants to pay the sum of [illegible] damages.

Although the court's action in dissolving the temporary injunction is assigned as error, it is conceded that this court has no jurisdiction to pass upon the constitutionality of the so-called [illegible] Aside from our lack of jurisdiction to pass upon that question, we have no power in this case to review any question arising upon the motion to dissolve the injunction or the court's ruling thereon. No appeal was taken from that order. The appeal which is attempted to be prosecuted here is from the order of the court assessing damages against appellants and their sureties, is the only question open to us on review.

Under the circumstances disclosed by the record in this case, we think the assessment of damages in the sum of [illegible] against appellants was both reasonable and just. Whatever insufficiency there may have been in the testimony of the witnesses who were sworn and examined on the question of attorney's fees and whatever objections might properly have been made as to the qualifications of the witnesses who testified in this case, the assessment of damages should not be disturbed on that account. It is a well settled rule of law that where the value of the services [illegible] is the matter in issue, the court not only may but should apply its own knowledge, experience and judgment as to the value of legal services rendered in the particular case and its [illegible] not be reviewed on appeal unless clearly and manifestly against the weight of evidence. [illegible] Ill. 311, [illegible] Ill. [illegible]

[illegible] affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 13th day of March in the year of our Lord one thousand nine hundred and twenty-two

Justus L. Johnson

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-one, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6942 Agenda No. 44

Amelia Thompson, appellee,)
vs.)
) Appeal from La Salle
Chicago, Rock Island & Pacific)
Railway Co. & Dir. Gen. of Rail-)
roads, appellant,)

224 I.A. 625

JONES, J.

The appellee, Amelia Thompson, filed a praecipe for summons against the appellants on September 26, 1919. Summons was issued pursuant thereto and was returned showing service on both appellants. The declaration made no charge against the appellant the Chicago, Rock Island & Pacific Railway Company. It contained but one count and declared against the Director General only. The appearance of both appellants was entered in writing by William D. Fullerton, their attorney. The Director General filed a plea of the general issue. The Railway Company filed no plea at all. A jury was duly empaneled and sworn to try the issue. The evidence was heard. The court gave instructions in which it used the word "defendant" only in the singular. The jury returned a verdict against "the defendant" and assessed plaintiff's damages at the sum of $250. A motion was made by both appellants for a new trial. This motion was overruled and then both appellants moved in arrest of judgment. The court overruled this motion and entered judgment against both appellants jointly for the amount of damages mentioned in the verdict. Both appellants jointly prayed an appeal which was allowed upon condition that they file an appeal bond in the sum of $500 within thirty days thereafter, the bill of exceptions to be tendered within sixty days thereafter. The appeal bond was entered into by appellants jointly and duly approved. This cause is now here upon appellant's joint appeal.

A large number of assignments of error was made on the

Gen. No. 6946 Agenda No. 49

Media Thomson, Appellee,

vs.

Chicago, Rock Island & Pacific Railway Co. & Ill. Cen. R. R. Railroads, Appellants.

Appeal from the Appellate

JUNE, 1.

The appellee, Media Thomson, filed a pseudo-in-
summons against the appellants on October 20, 1917.
on both appellants. No deed action made to change venue
the appellant the Chicago, Rock Island & Pacific Railway Co.
venue is sustained but one count was declared against that
Illinois Central only. The appearance of not a resident
entered filed by Illinois Central. Demurrer filed
The Illinois Central filed a plea of the statute limit.
Railway Company filed no plea at all. Plaintiff
plied and sought to try the issue. The court
sustained the instructions in which it was the first defendant
only in the singular. The jury returned a verdict
"the defendant" and assessed plaintiff's damages at
$250. A motion was made by both defendants for a new
This motion was overruled and then the defendants moved
arrest of judgment. The court overruled all motions
as judgment against both defendants for the full amount
damages mentioned in the verdict. The Illinois Central
an appeal which was allowed upon a condition that the
appeal bond in the sum of $500 which had theretofore
bill of exceptions to be taken. Plaintiff then dismissed
The appeal bond was entered into by respondent jointly and
approved. This came in and here upon appellant's joint motion.

A large number of assignments of error was made on the

record. In view of our ultimate conclusion concerning this case, it will not be necessary to discuss all of them.

Appellee charged in her declaration that the Director General of Railroads was operating the lines of the Chicago, Rock Island & Pacific Railway Company and that it was his duty to receive and safely transport all persons who had a proper ticket for passage; that on or about the 1st day of November, 1918, at 11:30 o'clock at night, the plaintiff (appellee) purchased a ticket from the agent of the defendant at Chicago entitling her to be carried as a first class passenger on one of defendant's trains from Chicago to Marseilles, Illinois; that the defendant, regardless of his duty in that behalf carelessly, negligently, willfully and maliciously refused to accept her said ticket and refused to carry her on its train as a passenger, and that the conductor then and there accusing her of being drunk, carelessly, negligently, willfully and maliciously forced her off of the train in the presence of a great number of people, thereby subjecting her to scorn, etc.

The testimony of appellee shows that she had lived in Marseilles about four years with her husband. She was forty-four years of age and had been married previous to her marriage with Thompson. For several years she had the exclusive care and control of her nephew, a little boy by the name of Lester Colley who was eight years of age and who had been totally blind since he was about six weeks old. On or about December 20, 1918, she left Marseilles in the morning with the blind boy for Chicago. She intended to take him to the Charitable Eye and Ear Infirmary, located in that city, to which institution she had a letter of introduction from one of the supervisors of Bureau County. After her arrival in Chicago she went to a restaurant and then to the Eye and Ear Infirmary where the boy was examined. She then went to some down town stores where the boy played with a rocking horse and listened to some music. She testified that she intended to

record. In view of our without exception [illegible], this case, it will not be necessary to discuss all of them.

A police officer in her [illegible] the [illegible] al of railroads was operating the line of the [illegible], Island & Pacific Railway, [illegible] cive and ready to [illegible] for passage; that on or about the [illegible] at 11:30 o'clock at night, [illegible] a ticket from the agent of the [illegible] her to be awaked at a [illegible] train from Chicago to Kansas City. [illegible] regardless of his duty in that behalf [illegible], willfully and notoriously refused to [illegible] refused to carry her on the train [illegible] conductor then and there [illegible] negligently, willfully and [illegible] in the presence of a [illegible] her to leave, etc.

The testimony of [illegible] police about four years of age and [illegible] Thomson. [illegible] control of her [illegible] who was eight years of age [illegible] he was about six years old. [illegible] left Kansas City in the morning with the [illegible] located in Iowa City, [illegible] introduction [illegible] her arrival in Iowa City [illegible] Iowa and her [illegible] to come down town [illegible] and listened to some music. [illegible]

take the train back home that afternoon but because of the inclement condition of the weather she decided not to return that afternoon but to take a later train. She then went to the place of business of William McInnerny, whom she claimed she had known for thirty years and where she and the boy desired to go to get something to eat and to hear a victrola. Just prior to her going to McInnerny's, she went to call on a lady friend living at 154 North Waverly Ave. When her call upon her friend was concluded she proceeded to McInnerny's which she denominates as "Billy's place". This place had a saloon in the front part in which a victrola was located. In the room back of the saloon was a restaurant. Appellee was unable to remember whether the door between the saloon and the restaurant was a swinging door or not. She remained at this place from about six o'clock in the evening until it was time for her to go to her train which left the LaSalle Street Station at 11:30 P.M. The record does not disclose where McInnerny's place is located. Appellee has very little recollection of how she reached it except that she went by street car. Whether it was necessary for her to make a transfer or not she can not tell. Where she boarded the car or what line she took she does not know. She says that the weather was bad and she stayed in the restaurant all the time she was at McInnerny's; that while there she met two women whom she had never known before. They sat at a table drinking. The drinks were served by "Billy" who also served the other women. She does not know what the other women drank nor what they called for. She says, however, that what they drank was not intoxicating. In the meantime the little blind boy was in the saloon near the victrola and about him were men patronizing the bar. She did not pay for any of the drinks, neither did the women who were with her at the table. She says that "Billy" must have paid for them as he would come in once in a while and say "What will you have to drink?" When the time arrived for her to go to the train, "Billy" introduced her to a man by the name of

take the train back home that afternoon but lack of the
implement condition of the weather she decided not to return that
afternoon but to take a later train. She then went to the place
of business of William McInnerny, where she obtained the [illegible]
for [illegible] years and where she had the [illegible] to get
accepting to eat and to have a victoria. Just prior to her
going to McInnerny's, she went to call on a lady friend of her
at 1[illegible] North Waverly Ave. When her call was [illegible]
accompanied she proceeded to McInnerny's which was [illegible]
"Billy's place - This place had a saloon in the [illegible]
which a [illegible] was located. In the rear [illegible]
a restaurant. Apparently she wanted to remember whether the [illegible]
between the saloon and the restaurant [illegible]
the restaurant at [illegible]
until it was time for her to go to her train. [illegible]
[illegible] at 11:40 P.M. The [illegible]
McInnerny's [illegible]
of her arm resulting in severe [illegible]
it was necessary for her to take a [illegible]
there she boarded the car at 1[illegible] and [illegible]
the city that the accident was [illegible]
all the time she was at McInnerny's [illegible]
women with whom she had [illegible]
ing. The lights were [illegible]
women. She could not know that [illegible]
called [illegible] Mr. McInnerny, [illegible]
interruptions. In the meantime the [illegible]
saloon [illegible] the victoria [illegible]
bar. She did not go [illegible] the saloon, [illegible]
women who were with her in the [illegible]. She [illegible] Billy
been with for time is he worked [illegible]
"What will you have to drink?" [illegible]
on in the train. Billy's information [illegible]

Smith or Clark. She doesn't remember which. "Billy" told her it was a bad night and that the man he introduced her to would take her to the train. She then left the place going out through the saloon where the men were congregated although there was a side entrance to the restaurant. Upon their arrival at the La Salle Street Station, she purchased a ticket on the first floor of the Station and proceeded with Smith and the boy to the second story of this Station which is on the level with the railroad tracks and train sheds. She presented her ticket to the gatemen, who punched it and permitted Smith to accompany her to the train. According to her testimony the man who sold her the ticket advised her she had only three minutes in which to catch the train. She claims to have hurried and upon reaching the entrance to the car in the train which she intended to ride to Marseilles, Smith helped the little boy on the train and placed him in the first seat of the coach. She said that she told the little boy to be quiet and then she proceeded out to the vestibule and thanked Smith for his kindness in helping her and the boy to the train and told him that when she was in Chicago again she would be glad to meet him. According to her story, about this time the conductor approached her and in a loud and coarse manner told her she could not ride on the train because she was drunk, to which she replied, "Thank you" and asked Smith to take the little boy off the train, and she, Smith and the boy left the train without making any remonstrance whatever to the conductor or denying his charge. She claims that she said nothing because Smith told her not to as she had a good case against them (meaning the appellants).

She, Smith and the boy then left the Station. On their way out she and Smith talked to the gateman and to the ticket agent. She then went back to McInnerny's where she borrowed $5.00 and went to a hotel about a block from his place. She and the boy stayed there all night and did not leave Chicago until the next

afternoon about five o'clock. She said she drank intoxicating liquors until about four years ago when she married her present husband and denys drinking any such liquors since that time.

The little boy corroborated appellee as to what occured at Railway Station. He denied that she staggered or was drunk. However, he says that his aunt is mistaken about the length of time they were in Chicago. He says they arrived there the day before the occurrence at the Station and that they had been at "Billy's"place both days and that they stayed two nights at the same Hotel.

No other witnesses were called on behalf of appellee. No attempt was made to account for the absence of McInnerny and Smith and their failure to testify.

The conductor, the porter, the gateman and the ticket agent all testified in behalf of the Director General. They corroborate each other and their testimony is in direct conflict with thet of appellee on nearly every material question of fact. The ticket agent has no recollection of selling the ticket to her and does not recall having seen her until after she claims she had been ejected from the train. He says that she complained of her treatment and he offered to take the ticket back and refund her the money. He testified positively and clearly that she was noticeably drunk at the time. One can not fail to draw the inference from his testimony that the ticket was not originally purchased by her but was obtained by one of those in company with her at the time. The gateman testified that he saw and talked with her as she went through the gate and told her the conductor would probably not let her ride upon the train on account of her drunken condition. She replied "I'm all right" and he let her proceed because, as he claimed, he had no authority to say who should not be privileged to become a passenger on a train. He saw her on her return after being refused as a passenger and he says that he again noticed her intoxicated

condition. He had noticed her as she proceeded toward the train. The blind boy was on one side of her and Smith was on the other and it was necessary for Smith to assist her because she was unable to walk without staggering.

The porter, a colored man, testified that when she attempted to board the train he refused to let her do so because she was intoxicated. Smith proceeded a car length further to where the conductor was, to talk to him about the matter and during this time an expressman was assisting appellee. The little boy had taken his seat on the steps of the car. After Smith had talked to the conductor, the latter approached the car entrance and engaged in a conversation with the appellee. According to the conductor's testimony, she reported to him that the porter, calling him a very vile name, had refused to let her on the train. The conductor testified that he also told her that she was drunk and that he had no right to accept her as a passenger. He further testified that Smith told him that the woman was all right and that he was her brother and he had telegraphed to her husband at Marseilles to meet her. The conductor, further, stated that when his train arrived that night about two A.M. at Marseilles, he looked over the platform and there was no one there except an employee of the Company.

It is manifest to us that the great weight of testimony is against the contention of appellee. We are constrained to believe the witnesses who testified that she was drunk and was not in a condition to be admitted as a passenger, rather than the witnesses for the appellee. We, therefore, find the following as facts in this case.

First - That appellee was drunk and in such a drunken condition when she sought to get upon the passenger train of the Chicago, Rock Island and Pacific Railway Company at the time shown by the evidence, that it was the duty of the conductor to refuse to admit her;

Second - That the conductor was not guilty of any such misconduct as is charged in the declaration against the Director General through his conductor.

In view of our finding, it is unnecessary to discuss or rule upon any of the other questions involved in this case, and we therefore, reverse the cause as to both appellants with a finding of facts as above set forth.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 13th day of March in the year of our Lord one thousand nine hundred and twenty-two

Justus L. Johnson

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-one, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6946 Agenda No. 47

John O'Connor, appellee,)
vs.) Appeal from Will
E. C. Hall, appellant,)

JONES, J.

224 I.A. 625

This is an action in forcible entry and detainer brought by appellee, O'Connor, against appellant for possession of certain premises in the City of Joliet, known as 115 Madeline St. and which consist of a five room dwelling house, etc. The original rental agreement between the parties was evidenced by a memorandum kept in a rent book of appellee and which is as follows: "Rented from John O'Connor, the above described premises except barn thereon, but renting the coal shed in said barn until April 11, 1912, at a rental of Fifteen $15) Dollars for each month payable monthly in advance. Said premises are rented by the undersigned at his own risk and in their present condition of repair and in consideration of the leasing of said premises and for other valuable considerations, it is agreed that the owner of said premises or agent for its owner shall not be liable in any way for any accident or damages of any kind. The owner reserves for himself and his lessee the right of ingress and egress upon said premises to and from said barn. Said premises are rented for dwelling purposes and no other purpose. Tenancy commences November 11, 1911." This memorandum was signed by appellant, Hall.

At the expiration of the definite term of five months mentioned in said memorandum, appellant did not surrender possession of the premises but held over without any new agreement or arrangement therefor with the landlord. He continued to pay rent at the rate of Fifteen ($15) Dollars per month until September 10, 1914, when it was agreed by the parties that appellant should

thereafter pay one-half of the water tax and still later it was agreed between them that he should pay all the water tax.

On March 11, 1919 the rent was raised from $15.00 per month to $17.00 per month by agreement of the parties and appellant paid at the new rate thereafter. In February, 1920 he was notified by appellee that the rent beginning March 11, 1920 would be raised to $22.00 per month. Appellant declined to agree to the demand of appellee for higher rental but made a counter-proposition to pay a rental of $20.00 a month. No agreement was had between the parties as to such counter-proposition and in April following appellee served appellant with a notice to quit on June 11, 1920. Neither party acted upon said notice but on July 1st, 1920, appellee served appellant with a so-called thirty day notice to surrender possession of the premises on the 11th day of August, 1920. The last rent paid was $17.00 being rent from July 11, to August 11, 1920.

Appellant refused to yield up possession of the premises pursuant to said last mentioned notice and on August 14, 1920 this suit was started before a justice of the peace. Judgment was there rendered in favor of appellee. An appeal to the Circuit Court was prosecuted and that court entered judgment on a directed verdict in favor of appellee. This appeal is from that judgment.

It is claimed by appellant that he was a tenant from year to year and as such, under the statute, he was entitled to sixty days notice to quit. This suit is predicated on the theory that appellant was not a tenant from year to year but was a tenant for a period less than a year and therefore was only entitled to thirty days notice to quit.

It is conceded by the parties that the original renting was for a period less than a year to-wit, five months, and that the holding over by appellant at the expiration of said term was without any new arrangement of any kind. In fact at no time

[illegible]

On March 11, 1949 the rent was [illegible] to $[illegible].00 per month by agreement of the [illegible] paid at the new rate thereafter. [illegible] notified by [illegible] that the rent beginning [illegible] would be raised to $[illegible].00 per month. [illegible] agree to the amount of [illegible] higher [illegible] arrears-proceeding to pay a rental of $[illegible] agreement was had between the parties [illegible] ation and in April following [illegible] a notice to quit on June 15, 1949. [illegible] said given but on July 1st, 1949, [illegible] a so-called thirty day notice to [illegible] premises on the 15th day of August, 1949. [illegible] was $[illegible].00 [illegible]

Appellant remained [illegible] pursuant to said last [illegible] this suit was [illegible] was there rendered in [illegible] suit Court was [illegible] directed verdict in favor of [illegible] judgment.

It is claimed by [illegible] to year and so [illegible] days notice to quit. [illegible] appellant was [illegible] for a month from the [illegible] thirty days notice to quit.

It is contended by the [illegible] the month, from the month, [illegible] without any [illegible]

thereafter was there any new arrangement made between the parties in reference to the term of the tenancy. Whatever new arrangements were made, related to increase of rental and the payment of water taxes, etc. A careful examination of the record in this case does not disclose any intention of the parties to expressly continue the lease for a fixed and definite term. Whenever a lease for a definite term has expired and the tenant holds over without any new arrangement therefor, the law implies a new tenancy. Where the tenancy was originally for a year or for a longer period, then the statute provides that the tenancy becomes one from year to year. Where the tenancy is for any period less than a year, the holding over will be construed as being for another term of the same length of time. (Brickett vs. Ritter 16, Ill. 96.)

Applying the law as above stated to the facts in this case, it must be concluded that appellant was not a tenant from year to year and therefore was not entitled to sixty days notice to quit. Thirty days notice was sufficient. However, it is claimed by appellant that inasmuch as his tenancy began on November 11, 1911, it expired on the 10th of August, 1920, whether his tenancy had become one from month to month or for successive periods of five months each. He, therefore, urges that the notice for him to quit on August 11, gave him the right to occupy the premises after a new term had begun. We do not think his position is tenable. It is evidence that the purpose of the notice was to demand possession of the premises at the expiration of the term. It has been repeatedly held by courts of last resort that a notice to terminate a tenancy is not insufficient or defective because the demand is made to vacate the premises the day following the expiration of the tenancy. (Boss vs. Hagan 261 Fed. 254; Harris vs. Halverson 23 Wash. 779; Searle vs. Powell 89 Minn.278; Detroit Savings Bank vs. Bellamy 49 Mich. 317; Baker vs. Kenny 69 N.J. Law, 180.)

The judgment of the Circuit Court is affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-

Clerk of the Appellate Court.

6940

2144

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-one, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

224 I.A. 625

BE IT REMEMBERED, that afterwards, to-wit: on the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Andrew Salata, appellee,	)	
vs.	)	Appeal from County Court
Uhro Russian Saint Mary's Greek Catholic Church of Joliet, a Corporation, appellant,	)	of Will

224 I.A. 625

PARTLOW, J.

Appellee, Andrew Salata, began an action of assumpsit in the county court of Will County against appellant, Uhro Russian Saint Mary's Greek Catholic Church of Joliet, a corporation, to recover $450.00 for a picture painted by appellee for appellant, $47.15 for a picture frame therefor, and $26.00 for marblizing four pillars in the church. The jury returned a verdict for $423.15. Judgment was rendered upon the verdict and an appeal was prosecuted to this court.

The first ground of reversal is that no contract was ever entered into for the picture and that the judgment is contrary to the law and the evidence. Appellant is a religious corporation and maintains a church in the northern part of the City of Joliet. The governing body of the church consisted of the priest and four trustees elected by the congregation for one year. Father Affendick was the priest in charge from about October 25, 1919 to May, 1920. In September, 1919, the trustees were John Farrell, John Gulas, George Pecenka and Basil Golubaer. After the first Sunday in January, 1920, the trustees were John Budnar, John Hritz, Steve Gulas and the name of the fourth trustee does not appear in the evidence. The negotiations for the picture and the time during which it was being painted covered the period from October 25, 1919, to Easter Sunday, 1920.

The trustees held meetings about once a month mostly in the church when the congregation was assembled. There was in

Andrew Salgato, appellee,	
vs.	Appeal from County Court
Uuno Hussian Saint Mary's Greek Catholic Church of Lofton, a Corporation, appellant.	of Will

Opinion, 4.

Appellee, Andrew Salgato, began an action of assumpsit in the county court of Will County against appellant, Uuno Hussian, Saint Mary's Greek Catholic Church of Lofton, a corporation, to recover $480.00 for a picture painted by appellee for appellant, $47.15 for a picture frame therefor, and $20.00 for installing four pillars in the church. The jury returned a verdict for $252.15. Judgment was rendered upon the verdict and an appeal was prosecuted to this court.

The first ground of reversal is that the contract was entered into for the picture and that the judgment is contrary to the law and the evidence. Appellant is a religious corporation and maintains a church in the northern part of the city of Lofton. The governing body of the church is composed of the priest, trustees elected by the congregation, and officers. Appellee was an artist in Lofton from [illegible] to May, 1920. In September, 1919, the trustees and priest, John Galas, George [illegible] met in Will [illegible]. After the meeting in January, 1920, the trustees [illegible], John, Steve Gulas and the priest [illegible] agreed in the evidence. The regularity of the [illegible] the time during which it was being painted [illegible] from October to, 1920, is [illegible] under.

The trustees held [illegible] about once a month [illegible] church when the congregation was assembled. [illegible]

the church a Ladies' Altar Society and a Men's society. The evidence tends to show that prior to the painting of the picture in question, the appellee, who was a painter residing in Joliet, at the request of either the Ladies' Altar Society or Trustee Farrell, made a single sketch of the Holy Virgin and this sketch was taken to the church prior to October 25, 1919. The new priest took charge of the parish about that time and some time later he saw the sketch and requested that appellee be sent to the parish house. When the appellee went to the parish house, the priest and the appellee, in the presence of several witnesses, discussed the sketch and appellee was informed by the priest that the sketch was not in the style adopted by the appellant church and that only pictures painted in the Byzantine style could be used in the church. Appellee informed the priest that he was not acquainted with the Byzantine style and asked the priest to loan him a picture painted in that style so he could study it. The priest gave appellee a small picture in Byzantine style showing the ascension of the Holy Virgin and from it appellee promised to make a rough sketch of the picture in Byzantine style and submit it to the priest for his approval. A Short time after this appellee returned to the parish house with the rough sketch for the inspection of the priest. There is a conflict in the evidence as to what took place at this time. Appellee testified that he was then directed by the priest to complete the picture for which he was to receive $450.00, and other witnesses corroborate him in this respect. The priest testified that he informed appellee that the sketch was not acceptable and that appellee should not attempt to paint the picture, and other witnesses corroborate the priest in this statement.

The picture, however, was painted by the appellee, and a frame was placed on it costing $47.15. It was hung in the church where it remained for some time but later was removed

the church a Indian' idea. [illegible] church's motive. The evidence tends to show that prior to the [illegible] of the letters in question, the appellee, who was a painter residing in Quincy, at the request of either the Indian' [illegible] Barrell, made a single sketch of the only image [illegible] was taken to the church prior to October 1, 1911. The priest took charge of the parish about that time [illegible] later he saw the sketch and requested that it be [illegible] to the parish house. When the appellee [illegible] the priest and the appellee, in the [illegible] discussed the sketch and appellee was informed by the priest that the sketch was not in the style [illegible] church and that only sketches similar to the [illegible] could be used in the church. Appellee [illegible] he was not acquainted with the Byzantine style [illegible] priest to loan him a picture [illegible] study it. The priest gave appellee a small [illegible] style showing the [illegible] appellee promised to make a rough sketch of the [illegible] Byzantine style and return it to the priest [illegible]. A short time after this [illegible] with the rough sketch for the inspection of the [illegible] in a conflict in the evidence [illegible] time, appellee testified that he [illegible] to complete the sketch [illegible] other witnesses corroborate his [illegible] testified that he [illegible] accepted by the [illegible] sketches, and other witnesses testified [illegible] satisfactory.

The sketch, however, was [illegible] a frame was placed on it ready [illegible]. It was hung in the church where it remained for some time [illegible]

and placed in storage. The appellant refused to pay for the picture and the frame, and this suit was brought.

It is not contended that there was any regular meeting of the trustees at which a contract was entered into authorizing appellee to paint the picture, hence there is no record of any order having been given. The evidence of the execution of a contract consists of statements and acts of the priest and various trustees which appellee contends prove that a contract was entered into. The priest admits that after the talk with appellee at the parish house, that on more than one occasion he spoke about the picture from the altar in the presence of the congregation and that several of the trustees were present on each of these occasions. He also said that about $175.00 had been turned over to the trustees by the Ladies' Altar Society to pay for it. Trustee Budnar testified that he heard the priest say from the altar once or twice that a collection was being taken for a picture to be placed above the altar. John Gulas, a former trustee, testified that a committee was appointed to collect money for the picture and the priest told him that appellee was going to paint a picture for the church. The evidence also shows that trustee Farrell ordered the work done on the pillars and that he helped appellee measure the space back of the altar where the picture was to be placed and that these measurements were made in the presence of trustees Steve Gulas and George Pecenak. After the picture was completed, trustees Farrell and Hritz went to the house of appellee, got the picture, carried it to the church, and placed it back of the altar where it remained for some time.

It is apparent from the record that the case was tried, partly at least, upon the theory that there was a contract between the appellee and appellant for the picture and that appellant claimed that the picture, as painted, did not comply with the contract. This contention is not urged in this court

and placed in storage. The appellant refused to pay for the picture and the frame, and this suit was brought.

It is not contended that there was any regular meeting of the trustees at which a contract was entered into employing appellee to paint the picture, hence no record of any such having been given. The evidence of the existence of a contract consists of statements and acts of the priest and certain trustees which appellee contends prove that a contract was entered into. The priest admits that after the talk at the meeting at the parish house, that on more than one occasion, he talked about the picture with the trustees at the meetings of the congregation and that several of the trustees were present at each of these occasions. He also said that about $175.00 had been turned over to the trustees by the ladies' altar society for the [illegible]. Trustee [illegible] testified that he heard [illegible] the altar and [illegible] that a committee was being formed [illegible] a picture would be placed above the altar. John [illegible], another trustee, testified that a committee [illegible] collected money for the picture and the priest said that appellee was going to paint a picture for the church. The evidence also shows that trustee Krooll ordered the [illegible] of the [illegible] that he helped [illegible] the picture was to be placed [illegible] made in the presence of trustees [illegible]. After the picture was completed, [illegible] went to the house of appellee, got the picture, brought it to the church, and placed it back of the altar where it remained for some time.

It is apparent from the record that the suit was based, partly at least, upon the theory that there was a contract between the appellee and appellant for the picture and that appellant claimed that the picture, as painted, did not comply with the contract. This contention is not urged in this court

but the fact that it was urged in the trial court is significant here for the reason that it is a partial admission on the part of the appellant that there was, in fact, a contract. The eleventh, twelfth, thirteenth and fourteenth instructions given on behalf of the appellant are based upon the laws of contract and not upon the theory that there was no contract.

When the trustees of a church are authorized to execute contracts for the church they should act as a body, or delegate the power to one of their number, or ratify and approve the acts of one of their number acting for them. The unauthorized and unratified act of one trustee cannot bind the church. St. Patrick's Catholic Church vs. Gavalon, 82 Ill. 170. The evidence was sufficient to justify the jury in finding that the appellee was ordered by Father Affendick to make the picture and that a majority of the trustees knew the order had been given. They knew the work was being done by the appellee. They received the picture after it was completed and placed it in the church and, by their actions, they accepted and ratified the order of the priest in this regard and the church was bound thereby and was liable for the contract price. St. Patrick's Church vs. Abst. 76 Ill. 252.

The small print from which the picture was painted and the picture itself have been sent to this court for our inspection. Before the order was given and before the work was done the trustees of appellant knew about appellee and his ability to paint a picture. We are of the opinion that the work as done by the appellee was in substantial compliance with the contract and with the print which was given to the appellee and from which he was to paint the picture.

Complaint is made of the first and fifth instructions given on behalf of the appellee. The first instruction is as to the degree of proof required of the appellee to entitle him to a verdict, and the fifth tells the jury that if they believe from a preponderance of the evidence that appellee performed the work

as alleged in the declaration and that no price was agreed upon that appellee may recover the reasonable value of the work done. The objection to both of these instructions is that they merely refer to what is alleged in the declaration and do not contain recitals of fact upon which the jury could base their verdict. Each instruction might have been in more apt language, but from an examination of all the instructions given, we are of the opinion that the jury was fully instructed as to the law applicable to the case and that no injury was occasioned to appellant by reason of the first and fifth instructions given.

We find no reversible error and the judgment is affirmed.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 13th day of March in the year of our Lord one thousand nine hundred and twenty-two

Justus L. Johnson
Clerk of the Appellate Court.

6954 (2145a

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-one, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

224 I.A. 625

BE IT REMEMBERED, that afterwards, to-wit: on the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Frank Dushane, appellee,)
vs.) Appeal from La Salle
City of Ottawa, appellant,)

224 I.A. 625

PARTLOW, J.

Appellee, Frank Dushane obtained a judgment for nineteen hundred dollars in the circuit court of La Salle county against appellant, the City of Ottawa, for damages caused by the flooding of a house and barn which he held as tenant, and from that judgment this appeal was prosecuted.

As grounds for reversal, it is contended by appellant that appellee's injuries were due to his own negligence; that he had no cause of action against the appellant, but any right of action he might have was against his landlord; that the evidence does not show the injuries to the appellee and his family were due to the flooding of his house and barn; that there was a variance between the notice served on the appellant and the evidence in the case and for that reason the notice should not have been admitted in evidence; that the court improperly refused twenty four instructions offered by the appellant.

Block six in Day's addition to the City of Ottawa is at the north east intersection of Christie street, which extends north and south, and Center street, which extends east and west. Appellee resided on lot ten block six which was on the east side of Christie street and was the second lot north of the intersection of the two streets. Lot eleven was just north of lot ten. A ravine about ten feet deep extended through block six from a southwesterly to nearly a west or northwesterly direction. It extended across the north and east portionof lot ten, and west along the north side of lot ten, across Christie street and extended northwesterly nearly a half mile and emptied into the Illinois river. The greater

Frank Dashwood, appellee,

vs.

City of Ottawa, appellant.

Appeal from [illegible].

PARTLOW, J.

Appellee, Frank Dashwood obtained a judgment for [illegible] hundred dollars in the circuit court of La Salle county [illegible] appellant, the city of Ottawa, for damages caused by the [illegible] of a house and barn which he held as tenant, and from the [illegible] this appeal was prosecuted.

As grounds for reversal, it is contended by [illegible] appellee's injuries were due to his own negligence; that [illegible] cause of action against the appellant, but [illegible] might have been against his landlord; that the evidence does [illegible] the injuries to the appellee and his family were due to the [illegible] of his house and barn; that there was a verdict [illegible] served on the appellant and the evidence in the case [illegible] improperly refused twenty four instructions offered by the [illegible]

Block six in Hay's addition to the City of [illegible] north east intersection of Jefferson street, [illegible] and south, and Center street, which is about [illegible] resided on lot ten block six which was on the [illegible] street and was the second lot north of the intersection of the [illegible] streets. Lot eleven was just north of lot ten. [illegible] feet deep extended through block six from [illegible] a west or northwesterly direction. It extended across the [illegible] and was [illegible] the [illegible] lot, [illegible] half mile and emptied into the Illinois river. The premises

portion of lot ten was below the level of the surrounding territory, but at the southwest corner of lot ten the ground was elevated two or three feet above the bottom of the ravine. The House in which appellee lived with his family was upon the higher piece of ground. There was a basement with a board floor laid on stringers. The south and west walls of the basement were cut into the slope of the ravine so that the windows on the south side were above the natural level of the ground, while on the north and east sides the level of the ground was even with or just below the floor of the basement. The house proper was built upon this foundation or basement and the floor of the second story was about on a level with the street. This house had been built for many years before that part of the city was improved, and for several years before the occurrence in question it had been vacant and was out of repair. There was a four inch tile drain from the basement of the house connected with a sewer which extended from State street, which was the first street east of Christie Street, through block six, west along the bottom of this ravine and across Christie street. This tile from State street had various other connections with it and drained a portion of the surface water which came through the ravine. The outlet of this tile extended west across Christie street through an arch, bridge or culvert which had been built to raise the surface of Christie street above the ravine. The bottom of the ravine was much lower west of Christie street. There was a foot bridge on the east side of Christie street for pedestrians, where the street had been elevated. The barn was northeast of the house in the ravine.

In 1914, the appellant paved Christie street and the grade of the street in front of appellee's house was raised eight or ten feet, and dirt from other parts of the city was hauled in to make this fill in the street and on a portion of the adjoining lots to the east. A permanent opening was made across the street

portion of lot ten was below the level of the [illegible] but at the northwest corner of lot ten the ground was elevated two or three feet above the bottom of the ravine. The house in which appellee lived with his family was upon the higher ground. There was a basement with a board floor like on either [illegible]. The south and west walls of the basement were dug into the side of the ravine so that the windows on the south side were above the natural level of the ground, while on the north and east sides the level of the ground was even with or just below the floor of the basement. The house proper was built upon the ground floor or basement and the floor of the second story was about on a level with the street. This house had been built for many years before that part of the city was improved, and for several [illegible] before the occurrence in question it had been vacant and in need of repair. There was a four inch tile drain from the basement of the house connected with a sewer which extended from some street, which was the first street east of Christie street, through block six, west along the bottom of this ravine and under that street. This tile from there street had [illegible] with it and drained a portion of the ravine so [illegible] through the ravine. The outlet of this tile [illegible] Christie street through an arch, bridge or culvert which had been built to raise the surface of Christie street [illegible]. The bottom of the ravine was much lower east of [illegible]. There was a foot bridge on the east side of [illegible] pedestrians, where the street had been [illegible]. The [illegible] northeast of the house in the ravine.

In 1911, the superintendent over Christie street had [illegible] of the street in front of appellee's house [illegible] ten feet, and dirt from other parts of the city had been hauled to [illegible] fill in the street and on a portion of the [illegible] lots by the east. A sewer had been [illegible] the street

for an outlet, which opening was ten or twelve feet below the surface of the street after the pavement was completed. On the west end of this opening, tile extended into the ravine west of the street. From the east end of the opening there was a sixteen inch tile which extended to a catch basin a short distance east of Christie street on lot eleven, and about forty or fifty feet north of lot ten. This catch basin was at the top of a pyramid of tile which extended down to the sixteen inch tile, and the catch basin was on a level with the surface of lot eleven after it has been filled. There was a manhole on lot ten. At the time the street was paved, the owner of lot eleven had dirt hauled on the lot, and the ravine on this lot was filled almost to the level of the surrounding territory. This filling extended into the notth side of lot ten, but that portion of the ravine on lot ten, for a distance of forty or fifty feet east and north of the house, remained in its natural condition. It is claimed by appellee that the drain west from the opening under Christie street became clogged, the water falling on block six, and particularly on lot ten, could not run away and accumulated in that portion of the ravine which had not been filled, and this water ran to the lowest point in the ravine.

Appellee testified that he moved into this house in June, 1915, but the preponderance of the evidence shows that he moved in October 12, 1915. The house had not been occupied for about nine years prior to that date and was in a bad state of repair. Minnie Boyle was the owner of lot ten at that time. She testified that she gave the appellee four months free rent for the repairs which he was to make on the house before it was fit for occupancy. Appellant offered to prove that Mrs. Boyle told appellee at that time that she did not want to rent the house to him because it was not habitable and was damp and might be flooded with water; that he told her he could get no other place to live, and she let him have the house until he could get another place, but this

for an outlet, which opening was then to be below that being the surface of the street after the pavement was laid down. In the west end of this opening, tile extended into the middle of the street. From the east end of the opening there was a culvert made of tile which extended to a catch basin, about thirty feet of Christie street on lot eleven, and about forty or fifty feet north of lot ten. This catch basin was at the top of a culvert of tile which extended down to the sewer line tile, and the catch basin was on a level with the surface of lot ten. It had not been filled. There was a manhole on lot ten. At the time the street was paved, the owner of lot eleven had filed a plan of the lot, and the roadbed on this lot was filled almost to the level of the surrounding territory. This filling extended into the north side of lot ten, but that portion of the roadbed on lot ten, for a distance of forty or fifty feet east and west of the house, remained in its natural condition. It is claimed by plaintiff that the drain pipe from the opening under Christie street through culvert, the water falling on block six, and particularly on lot ten, could not have been filled, or this water run to the lower point in the roadbed.

Plaintiff testified that in June or July, 1919, but the correspondence in the evidence shows that it was in October 2, 1916. The house had not been occupied for about nine years prior to that date and was in a state of repair. Minnie Doyle was the owner of lot ten at that time. The testimony that she gave the plaintiff was merely that she had the premises which he was to rent on the basis stated, it was OKE for possession. Plaintiff offered to prove that Mrs. Doyle told plaintiff at that time that she did not want to rent the house to all comers, it was not habitable and was dark and might be flooded with water. That so long her be could get no other place to live, she let him have the house when he would pay monthly rental, but that

evidence was excluded by the court. We think this evidence was improperly excluded. If appellee was warned before he moved into the house that it was damp and liable to be flooded, that fact should have gone to the jury. At the time he moved into the house Christie street had been paved and was in good condition. Lot eleven had been filled and the natural outlet of the ravine had been destroyed. The tile from the basement of the house had been disconnected and there was no natural outlet for the water falling in the ravine. The exact location of the catch basin on lot eleven, its elevation above the surrounding ground and what territory it drained, is in conflict in the evidence. Witnesses for appellee testified that the water from the ravine could flow into the catch basin and by this means most of the water from the ravine could escape, while witnesses for the appellant testified that water from the ravine could not flow into the catch basin for the reason that there was about eighty feet of solid dirt between the catch basin and the ravine and no connection between them. Appellee testified that the pavement on Christie street began to slip, crack and settle two or three weeks after he moved into the house and that the dirt slid down over the end of the tile west of Christie street and stopped up the outlet so that the water could not escape through the outlet. On the other hand the evidence on behalf of the appellant shows that the settling of the pavement did not begin until February or March, 1916, after the date of the flood. Appellee testified that after the outlet of the tile became clogged he called the attention of the city authorities to this condition and no repairs were made, but this evidence is disputed by the city officers.

The evidence shows that on the night of January 20, 1916, the heaviest rainfall that had been known to the oldest inhabitant of the city fell continuously from about ten o'clock at night until the next day. Bridges were swept away, the Illinois and Fox rivers and the various channels through which water flowed,

evidence was excluded by the court. We think this evidence was improperly excluded. If appellee was warned before he moved into the house and if it was then in a dangerous condition, that fact should have gone to the jury. At the time he moved into the house Christie street had been paved and put in good condition. Lot eleven had been filled and the natural outlet of the ravine had been destroyed. The tile from the basement of the house had been disconnected and there was no adequate outlet for the water falling in the ravine. The exact location of the catch basin on lot eleven, its elevation above the surrounding ground and what territory it drained, is in conflict in the evidence. Witnesses for appellee testified that the water from the ravine would flow into the catch basin and by this means most of the water from the ravine could escape, while witnesses for the appellant testified that water from the ravine could not flow into the catch basin for the reason that there was about eighty feet of solid dirt between the catch basin and the ravine and no connection between them. Appellee contends that the pavement on Christie street began to slip, crack and settle two or three weeks after he moved into the house and that the earth slid over the end of the tile west of Christie street and covered up the outlet so that the water could not escape through the tile. On the other hand the evidence on behalf of the appellant shows that the settling of the pavement did not begin until January or March, 1919, after the date of the flood. Appellee contends that after the outlet of the tile became closed he called the attention of the city authorities to that condition and requested them to open it, but this evidence is disputed by the city officers.

The evidence shows that on the night of June 30, 1918, the heaviest rainfall that had been known to the oldest inhabitants of the city fell, commencing about ten o'clock at night until [illegible] bridges were swept away, the [illegible] The [illegible] and the [illegible] themselves through which water [illegible],

over-flowed their banks. Hundreds of people were driven from their homes in the lowlands. In some of the streets the only means of passage was by row boats. The flood was so great that no ordinary provisions could take care of the water. The water falling on lot ten raised to a level of eight feet, flooding the barn, by reason of which one horse, of the value of one hundred twenty five dollars, was drowned or chilled to death, and another horse was injured to the extent of fifty dollars. Water rose in the house as high as the door knobs, and the basement and other rooms were flooded. Furniture was damaged and destroyed to the value of $100.00. Appellee testified that the water rendered his house dangerous and unfit to live in, and as the result thereof, his youngest child, Lila, took the diphtheria and died; that another child, Francis, became sick and is still suffering from that sickness, and his wife contracted illness from which she has not fully recovered.

The declaration consisted of two counts. The first count charged that it was the duty of the city to maintain a drain across Christie street for the purpose of draining the lot where appellee's house was located, while the second count charged that because of the fact that the city did construct a tile drain across Christie Street, at the point mentioned, which might serve for the purpose of draining the lot where appellee's house was situated, that the appellant had assumed the responsibility of keeping the lot dry, it thereupon became the duty of the city to keep and maintain the drain in such condition that it would drain the lot, which duty it failed to perform.

In a state of nature, before Day's addition was laid out and before Christie street was opened, this ravine naturally drained west across what was afterwards Christie street. After the addition was laid out and Christie street was opened some changes were made in the natural conditions, but the ravine continued to drain to the west. Some tile was put in the ravine but that fact is

not material here. When Christie street was paved all of these conditions were changed. These changes were made by the city and by the owners of lots ten and eleven. The court refused to permit the appellant to show that the filling of lot eleven was with the consent of the owner thereof, and we think that this evidence should have been admitted. The changes were probably for the benefit of all parties concerned and naturally increased the value of the lots ten and eleven, If the outlet of the ravine had been filled up by the owners of the lots, the city was under no obligation to the owners of those lots to furnish the outlet for that portion of the ravine which remained unfilled; neither was the city under obligations to furnish drainage for that part of lots ten and eleven which had been filled by the owners. The contention of the appellee is that regardless of this duty, the city did undertake to furnish drainage, and in furtherance of this attempt placed the catch basin on lot eleven and having undertaken such drainage it was the duty of the city to keep the outlet open and free from obstruction.

Even conceding that the city assumed the duty of drainage and the outlet became clogged, the appellee would have no cause of action, unless the stoppage of the outlet was the proximate cause of the appellee's damages. We think the preponderance of the evidence shows that all of the water naturally falling in the ravine had no means of escape. Also that the evidence shows that the rainfall on the night in question was so unusual as to flood every piece of low ground in the city whether drainage had been provided or not. It may be that if the outlet of this tile was clogged that some water which otherwise would have escaped through this tile, if it had been open, might have flowed down in the ravine and been added to the water which flooded the appellee's house. We think the preponderance of the evidence shows that appellee's house would have been flooded regardless of the stoppage of the tile. We do not think the evidence was sufficient to show that the stoppage

not material here. When Dimitrie should have found all as these conditions were changed. These changes were made by the city and by the owners of lots ten and eleven. The city's revenue permit the appellants to show that the failing of lot eleven, was with the consent of the owner thereof, and if there was such evidence should have been admitted. The changes were made for the benefit of all portion concerned and materially increased the value of the lots ten and eleven. If the outlet on the ravine had been filled up by the owners of the lots, the city was under no obligation to the owners of those lots to leave the outlet for that portion of the ravine which remained unfilled; neither was the city under obligation to fill in the ravine in front of lots ten and eleven which had been filled by the owners. The construction of the appellee is that regardless of his act, the city did undertake to furnish drainage, and to furnish one or the other placed the outlet beyond on lot eleven and having the best drainage it was the duty of the city to keep the outlet open and free from obstruction.

Even conceding that the city assumed the duty of drainage and the outlet became clogged, the appellee could have no cause of action, unless the damage of the outlet was the proximate cause of the appellee's damage. We think the preponderance of the evidence shows that all of the water accumulating in the ravine had no means of egress. Also that the ravine ever that it rained on the night in question was so narrow as to allow every piece of low ground in the city adjacent thereto had been partially or not. It may be that in the matter of this rain was clogged that some water which otherwise would have escaped through this alley, if it had been open, might have flowed over in the ravine and been added to the water which flooded the appellee's house. By their preponderance of the evidence shows that appellee's house would have been flooded regardless of the obstruction of the alley. We do not think the evidence was sufficient to show that the obstruction

of the tile was the proximate cause of the appellee's damage, neither are we satisfied from the preponderance of the evidence that the stoppage of the outlet took place before January 20, 1916. There is just as much evidence tending to show that the stoppage took place after that date as there is that it took place before that time. If the stoppage took place after that date appellee had no cause of action under his declaration.

A person cannot place himself, or his property and family, in a position of known danger and then, because he and his property have been damaged, recover for his own negligence even when the damages are the result of ordinary conditions, much less can he place himself in such a position and recover from extraordinary occurrences against which the city cannot protect him. Appellee knew or should have known that a house situated as this one was must of necessity be damp; that even in the event of an ordinary rain the basement would be flooded and in case of a deluge he might have expected just what took place in this case. After carefully considering all of the evidence we do not think it was sufficient to sustain the judgment.

The evidence shows that on the morning of January 21, 1916, after the flood, the appellee moved out of the house and went to the house of his brother where he staid for about ten days. During this time his family was apparently in good health. When the water subsided, he cleaned out the mud and filth in the basement, built fires upstairs and downstairs and dried the house out as best he could and then he and his family moved back into the house. A few days after he moved back, his wife and children began to take cold, sickness developed and resulted in the death of his youngest child on March 8. Appellee's excuse for moving into the house in the first place and for moving back after the flood was that he could not find any other place to go and was compelled to occupy the house as his home. The most of the damage sought to be recovered is for sickness which occurred after the family

of the tile was the proximate cause of the [illegible],
neither are we satisfied from the evidence of the plaintiff
that the stoppage of the outlet took place before January, 1913.
There is just as much evidence tending to show that the stoppage
took place after that date as there is that it took place prior to
that time. If the stoppage took place after [illegible] there
had no cause of action under his declaration.

A person cannot plead himself, or his property, into a liability,
in a position of imminent danger and then, because he and his property
have been damaged, recover for his own negligence. Where the
damages are the result of ordinary conditions, men have not in
place himself in such a position and recover from [illegible]
occurrences against which the city cannot protect him. [illegible]
knew or should have known that a house situated in that [illegible]
must of necessity be damp; that it would be the result of a [illegible]
rain the basement would be flooded and in case of a damage he
might have anticipated just what took place in this case. Other
conceivably could nothing all of the evidence we do not think it
sufficient to sustain the judgment.

The evidence shows that on the morning of [illegible], 1913,
after the flood, the [illegible] moved out of the house [illegible]
to the house of his father where he could be [illegible]
During this time his family was apparently in good health. After
the water subsided, he returned out the [illegible]
ment, built kiln [illegible] and [illegible] the house out
as best he could and then he and his family [illegible]
home. A few days after he moved back, [illegible]
go to work, without [illegible] in the [illegible]
his property [illegible]
the house in the first place and the moving back after the flood
was that he could not find any other place to go and was compelled
to occupy the house as his home. The most of the damage [illegible]
to be recovered in for evidence which occurred after the flood,

moved back. If appellee had not moved back, his damages would probably have been limited to his personal property. On behalf of the appellee one physician testified that the rheumatism and diphtheria suffered by appellee's family was the result of the damp condition of the house. On behalf of appellant two physicians testified that the rheumatism and diphtheria were not the result of the damp condition of the house, but were the result of other things. From this evidence we hold that the appellee did not prove by the preponderance of the evidence that the greater portion of his damages was the result of the flooding of his house.

Complaint is made by the appellant that there was a variance between the notice served on the appellant and the evidence in the case. Sec. 7, Chap. 70 of the Statute provides that any person who is about to bring any action in any court against an incorporated city for damages on account of personal injury, shall, within 6 months from the date of the injury, file in the office of the city attorney and also in the office of the city clerk, a statement in writing, signed by such person, his agent, or attorney, giving the name of the person to whom such cause of action accrued, the name and residence of the person injured, the date and about the hour of the accident, the place or location where such accident occurred, and the name and address of the attending physician. This statute applies only to personal injuries sustained as the result of accidents and does not apply to cases where damages are caused by flood, and for that reason no notice was necessary under the statute. While the court admitted the notice in evidence, we do not think any injury was done thereby.

Appellant in its brief and argument says that the law applicable in this case is so elementary and so well understood by bench and bar that it deems any citation of authority unnecessary, and not a single case is cited. Notwithstanding the elementary

[illegible] If appellee had not moved back, his damages would [illegible] been limited to his [illegible] property. [illegible] of the appellee one physician testified that the diseases [illegible] diphtheria suffered by appellee's family was the result of the [illegible] condition of his house. On behalf of appellee two physicians testified that the rheumatism and diphtheria were not the result of the damp condition of the house, but were the result of other things. From this evidence we hold that the appellee did not prove by the preponderance of the evidence that the greater portion of his damages was the result of the flooding of his house.

Complaint is made by the appellant that there was a variance between the notice served on the appellant and the evidence in the case. Sec. 7, Chap. 70 of the statute provides that any person who is injured by being run against in any street or incorporated city, town or village, may recover, within 6 months from the date of the injury, with the advice of the city attorney and also in the office of the city clerk, a statement in writing, signed by such person, his agent, or attorney, stating the name of the person to whom such cause of action accrued, the nature and residence of the person injured, the date and where the injury occurred, the place or location where such accident occurred, and the name and residence of the attending physician.

[illegible] injuries sustained on the sidewalk of the [illegible] to cause the appellee damages, he crossed up [illegible], and for that reason the notice was necessary [illegible] the [illegible] stated the notice in evidence, we do not think the [illegible] was [illegible].

[illegible] in the [illegible] that the [illegible] in this case is so [illegible] and so well understood by [illegible] that it does not [illegible] citation of authority necessary, nor [illegible] in error. Notwithstanding the [illegible]

propositions of law involved, appellant submitted to the court forty one instructions, eleven of which were given and the others refused. Twenty four of these instructions refused are argued separately in the brief. It will not be necessary to consider each of these instructions for the reason that the case must be reversed on the evidence. The instructions given were sufficient to cover each feature of the case necessary to be considered by the jury. We deem it proper, under the circumstances, to express our disapproval of the practice of burdening the trial court with such a mass of unnecessary work in the examination of so many instructions. Pioneer Fire Proofing Company vs. Clifford, 232 Ill. 150.

Appellee has assigned cross errors which question the action of the trial court in excluding from the jury the evidence in relation to the injury to the horses for the reason that they were in the barn which was located on lot eleven instead of on lot ten as alleged in the declaration, and also because the court gave to the jury the fourteenth instruction which told the jury that the appellee was not entitled to recover for the death or damage to the horses. The evidence shows that part of the barn was not located on lot ten as alleged in the declaration, but we are of the opinion that notwithstanding this fact, if the appellee was entitled to recover at all, the damages to the horses were proper elements to be considered by the jury.

For the errors indicated, the judgment will be reversed and the cause remanded.

Reversed and Remanded.

[illegible]

[illegible] of the trial court in excluding from the jury the evidence in Lagiss's the injury to the horses for the [illegible] to the [illegible] as alleged in the [illegible] the jury the instruction which [illegible] appellee was not entitled to recover for [illegible] with or damage to the horses. The evidence [illegible] Lagiss's on [illegible] the opinion that [illegible] entitled to recover it [illegible] sufficiently to be [illegible].

For the reasons [illegible] will be reversed [illegible] the cause remanded.

[illegible]

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 13th day of March in the year of our Lord one thousand nine hundred and twenty-two

Justus L. Johnson

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-one, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

I. N. R. Beatty, Harvey Beatty and C. W. Beatty, partners doing business under the firm name of I.N.R. Beatty Lumber Company, appellees	
vs.	Appeal from Will.
James P. Monahan and Edward Monahan, impleaded with the City of Wilmington, et al., appellants,	

PARTLOW, J.

Appellees, I.N.R. Beatty, Harvey Beatty and C. W. Beatty, partners doing business under the firm name of I.N.R. Beatty Lumber Company, filed their bill in the circuit court of Will County against the appellants, James P. Monahan and Edward Monahan, impleaded with the City of Wilmington, to establish a lien for $3328.77, upon funds in the hands of the City of Wilmington, being the balance due for tile, brick, and other materials furnished to Monahan Bros., by appellees under a contract which Monahan Bros. had with the said city for the construction of a system of sewers. Other parties, who had furnished material, were made parties defendant or filed intervening petitions. Upon a hearing a decree was entered for the full amount of appellees' claim; also finding the amounts due the other material men for material which they had furnished, and from that decree this appeal was prosecuted. No question is raised in this case as to any other claim except that of the appellees.

On June 12, 1909, an order was entered by the county court of Will county finding that the contract of Monahan Bros., with the City of Wilmington for the construction of said sewer system had been completed in substantial conformity with the requirements of the ordinance providing for the improvement; that there was a balance due Monahan for $7682.70 and it was ordered by the county court that the City of Wilmington hold this amount subject to the order

I. R. R. Beatty, Harvey Beatty and C. W. Beatty, partners doing business under the firm name of I.R.R. Beatty Lumber Company, appellees	
vs.	Appeal from Will.
James P. Monahan and Edward Monahan, impleaded with the City of Wilmington, et al., appellants.	

FULTON, J.

Appellees, I.R.R. Beatty, Harvey Beatty and C. W. Beatty, partners doing business under the firm name of I.R.R. Beatty Lumber Company, filed their bill in the circuit court of Will County against the appellants, James P. Monahan and Edward Monahan, impleaded with the City of Wilmington, to restrain a lien for $2,000.77, alleg claim in the hands of the city of Wilmington, being the balance due for bills, brick, and other materials furnished to Monahan Bros., by appellees under a contract with Monahan Bros. had with the said city for the construction of a system of sewers. Other parties, who had furnished material, were made parties defendant or filed intervening petitions. Upon a hearing a decree was entered for the full amount of appellees' claim; also finding the amounts due the other material men for material which they had furnished, and from that decree this appeal was prosecuted. No question is raised in this case as to any other claim except that of the appellees.

On June 14, 1920, an order was entered by the county court of Will county finding that the contract of Monahan Bros., with the city of Wilmington for the sewers mentioned in this case appears had been executed in substantial conformity with the requirements of the ordinance providing for the improvement, that there was a balance due Monahan for $2000.77 and it was ordered by the county court that the city of Wilmington hold this amount subject to the order

of the circuit court of Will county in relation to certain notices for mechanics' liens served on the city, and that the city pay the said amount according to the decree of the circuit court of Will county in the case of Beatty vs. City of Wilmington No. 26911. Prior to June 12, 1919, appellees had filed a bill in the circuit court of Will county for a lien on this fund. This suit was begun before the order of conformity was entered by the county court, and it is contended by appellants that because the order of the county court directed the fund to be held pending the final decree in case No. 26911 that the circuit court could not decree it to be paid in this case which was filed after June 12, 1919.

Section 37, Chapter 82, Hurd's Statutes 1917, page 1880 which relates to contracts for public improvements under special assessment, provides that any person who shall furnish material to any contractor, shall have a lien on the money, bonds, or warrants due such contractor, provided such person shall, before payment thereof, notify the officials whose duty it is to pay such contractor of his claim by a written notice, which lien shall attach only to that portion of such money or bonds against which no voucher has been issued. It thereupon becomes the duty of such official to withhold a sufficient amount to pay such claim, until the matter is determined, and the claimant may institute suit in the same manner as is provided in case of privately owned real estate, to determine the rights of the parties, and any payments so made to such claimant shall be a credit on the contract price. Suit No. 26911 was prematurely brought before the order of the county court was entered. A demurrer was filed and sustained to the bill. The record does not show what disposition was finally made of that case, but after the order of conformity was entered by the county court, this suit was commenced. Under the statute, the county court was without authority to specify in what suit the claims should be allowed and paid, and that part of the order of June 12, 1919, was a nullity. When notice was served by the appellees of their claim, they then had a right to enforce the claim in the same manner as is provided in case of

of the circuit court or will county in relation to certain wetlands for recreation' lines parcel on the city, and that the city has said amount according to the decree of the circuit court of Will county in the case of Smally vs. City of Chicago, 2811.

Prior to June 12, 1919, appellees had filed a bill in the circuit court of will county for a lien on this fund. This bill was begun before the order of condemnation was entered by the county court, and it is contended by appellants that because the order of the county court directed the fund to be held pending the final decree in case No. 26011 that the circuit court could not decree it to be paid in this case which was filed after June 12, 1919.

Section 27, Chapter 24, Smith's Revised Stat., 1919 which relates to contracts for public improvements where claims accrue, provides that any person who shall furnish material to any contractor, shall have a lien on the money, bonds, or warrants due such contractor, provided that notice shall, within thirty days, notify the officials whose duty it is to pay such contractor of his claim by a written notice, which lien shall attach only to that portion of such money or bonds equitably owing to such person for the work done or material furnished.

If the contractor becomes the duty of such officials to withhold a sufficient amount to pay such claim, until the matter is determined, and the claimant may institute suit in the name thereof as is provided in case of privately owned real estate, to enforce the rights of the parties, and any payments so made to such claimant shall be a credit on the contract price. Suit in. 2011 was properly brought before the order of the county court was entered. A demurrer was filed and overruled. The case. The record does not show that demurrer was filed in the case. The record does not show that demurrer was filed in the county court of that case, but after the order of condemnation was entered by the county court, suit was commenced. Under the pleadings. The county court had jurisdiction of the subject matter the claim should be allowed and paid. The fund that was of the value of from 1. 1919, was a liability. This matter was entered in the circuit court. Now then has a right to enforce the claim in the same manner as in ejectment in case of

privately owned real estate. In order to do this they filed their bill in chancery which they had a right to do under the statute. West Chicago Park Commissioners vs. Western Granite Company 200 Ill. 527; National Bank vs. Patterson 200 Ill. 215. The fact that they had prematurely brought suit did not prevent them from beginning another suit after the order of conformity had been entered. There is no plea of a prior suit pending, and the question is not raised in the answer, and is apparelty raised for the first time in this court. It was not material that a prior suit had been filed, and if it had been material it was necessary that the question should be raised by a plea, or answer in the trial court, and if that was not done it could not be raised in this court for the first time.

The case was not referred to a master in chancery to state the account, but the evidence was heard before the chancellor in open court and appellants contend that the decree should be reversed on that account, if for no other reason. The latest expression of the supreme court on this question is the case of Barnes vs. Barnes 282 Ill. 593, where it is held that where the items in an account are few, the court may state the account, but where the account consists of many items, covering a great length of time, and the testimony is conflicting, the court cannot proceed to ~~an~~ decree ~~accounting~~ until the ~~accounting~~ has been stated by a master, and objections to the account settled by him. The duties of the court, the public interests, and the rights of litigant forbid the examination by the court of intricate and complex accounts. A complicated account cannot be stated by the court even by agreement of the parties.

The pleadings do not bring this case within that rule. The first part of the answer of Monahan Bros., denies that there is any amount due appellees, but the answer is drawn, an appellants say, "in a double aspect." The answer alleges"that if it should so be that the court should decide against these defendants upon the issue of the obligation of these defendants of said contract, then

privately owned real estate. In order to do this they filed their bill in chancery which they had a right to do under the statute. West Chicago Park Commissioners vs. Eastern Illinois Company 200 Ill. 327; National Bank vs. Patterson 200 Ill. 418. The fact that they had previously brought suit in ejectment and taken them from beginning another suit after the order of contempt had been entered. There is no plea of a prior suit pending, and the question is not raised in the answer, and is especially raised for the first time in this court. It was the material that a prior suit had been filed, and if it had been material it was necessary that the question should be raised by a plea, or answer in the trial court, and if that was not done it could not be raised in this court for the first time.

The case was not referred to a master in chancery to state the account, but the pleadings are lengthy and complicated in the court and appellants contend that the cause should be reversed on that account, if for no other reason. The latest expression of the supreme court on this question is the case of Barnes vs. Palmer 208 Ill. 593, where it is held that where the items in an account are few, the court may state the account, but where the account consists of many items, requiring a great length of time, and the testimony is conflicting, the court cannot proceed to a decree until the accounting has been stated by a master, and objections to the account settled by him. The duties of the court, the public interests, and the rights of litigants would be substantially the same if injunction and equitable accounting.

The decree in the trial court was by agreement of the parties.

The questions in the trial court were solely that the first part of the decree of December 1908. Besides that there is any reason the pleadings, the decree is clear, no complaint has, "It a double decree." The usual clause "that it is doubtful as to that the court should settle the equity based into Barnes and the terms of the obligations of these defendants of this contract, the

the complainants would not be entitled to any relief further than for the sum of $105.58," because of certain items of damage set out in the answer which appellants claim as a set off. The last paragraph of the answer is as follows: "that the total of all the aforesaid items consisting of damages due to delay in delivery of material, misdelivery of material, non-delivery of material, overcharge of sewer pipe, cement, and sewer brick, amounts to $3233.19, in the aggregate, and that there is now due the complainants, after allowance of all set offs, deductions and credits, a balance of $105.58, and these defendants deny that the complainants are entitled to any other or further relief in the said bill demanded than the allowance of the aforesaid balance of $105.58." This answer is an admission that the unpaid balance of appellee's claim is $3328.77 as alleged in the bill, but the answer seeks to set off the items of damage against this amount and admits that the difference of $105.58 is due appellees. When an answer admits the allegations of the bill, it is not necessary that proof should be offered by the complainant to establish the allegations of the bill which have been admitted. Evidence was taken on these items od damage and the chancellor found that the appellants were not entitled to credit for any of them. In this condition of the record, after it was determined that the appellants were not entitled to any damages under the allegations of the answer, it was proper to render judgment against the appellants for the full amount alleged in the bill and there was no necessity of stating an account or of referring the cause to the master for that purpose.

James P. Monahan and Edward Monahan very earnestly insist that they did not enter into the contract in question with the City of Wilmington, but that the contract was, in fact, the contract of their brother, David Monahan. The evidence shows that there were four Monahan brothers: James P., Edward, David D., and Frank J. James P. Monahan and Edward Monahan, under the firm name of Monahan Bros., were plastering contractors in the City of Chicago, with

the complainants would not be entitled to any relief further than for the sum of $108.38," because of certain items of damage set out in the answer which appellants claim as a set off. The last paragraph of the answer is as follows: "that the total of all the aforesaid items constituting of damage due to delay in delivery of material, misdeliver, of material, non-delivery of material, overcharge of sewer pipe, cement, and sewer brick, amounts to $2525.19, in the aggregate, and that there is now due the complainants, after allowance of all set offs, deductions and credits, a balance of $108.38, and these defendants deny that the complainants are entitled to any other or further relief in the said bill demanded than the allowance of the aforesaid balance of $108.38." This answer is an admission that the unpaid balance of appellee's claim is $2528.77 as alleged in the bill, but the answer seeks to set off the items of damage against this amount and admits that the difference of $108.38 is due appellee. When an answer admits the allegations of the bill, it is not necessary that proof should be offered by the complainant to substantiate the allegations of the bill which have been admitted. Evidence was taken on these items of damage and the chancellor found that the appellants were not entitled to credit for any of them. In this condition of the record, after it was determined that the appellants were not entitled to any credit for the allegations of the answer, it was proper to render judgment against the appellants for the full amount alleged in the bill and there was no necessity of stating an account or of referring the cause to the master for that purpose.

Issue 2. Appellants claimed that [illegible] they did not enter into the contract in question with the firm of Williamson, but that the contract was, in fact, the contract of Frank Brotzen, David Monahan. The evidence shows that there were four Brotzen brothers: James H., Edward, David B., and Frank H. James H. Monahan and Harry Monahan, under the firm name of Monahan Bros., were plastering contractors in the city of Chicago, with

offices at No. 19 South La Salle street, and they were financially responsible. For about two years prior to 1909, David Monahan and Frank Monahan were engaged in business under the firm name of Monahan Bros., but this firm went out of business about 1909. In 1910, David Monahan organized a corporation known as Monahan Bros., which corporation did some business but ceased to exist in about one year after its organization. David Monahan went through bankruptcy in 1910, and in 1916 had judgments outstanding against him in excess of $5000.00 and he was financially irresponsible. From 1909 to 1915 David Monahan was in the employ of other parties.

In the summer of 1916, the City of Wilmington advertised for bids for the construction of this sewer system and Monahan Bros., put in a bid which bid was the lowest and the contract was awarded to them. Accompanying the bid was a certified check for $5000.00 signed by James P. Monahan and drawn on the Chicago Savings Bank and Trust Company being the bank with which appellants did business. The contract entered into between Monahan Bros. and the city of Wilmington began as follows: "this agreement made and entered into this 8th day of August, A.D. 1916, by and between James P. Monahan and Edward Monahan co-partners under the name and style of Monahan Bros., party of the first part, and the City of Wilmington, Will County, Illinois, a municipal corporation, party of the second part" and it is assigned by Monahan Bros., James P. Monahan, Edward Monahan and the city of Wilmington. After the contract had been executed between Monahan Bros., and the city, a contract was entered into between the appellees and appellants for the materials which were used in the work and for which this suit was brought. This contract was signed by Monahan Bros., by David Monahan, and David Monahan testified that, at the time it was signed, he told appellees that he was the contractor and that his brothers, the appellants, were not the contractors. In the answer of the appellants to the first bill, in case 26911, it was admitted that the appellants were the parties who entered into the contract with the City of Wilmington.

offices at No. 13 North La Salle street, and they were financially responsible. For about two years prior to 1909, David Monahan and Fred Monahan were engaged in business under the firm name of Monahan Bros., but this firm went out of business about 1909. In 1910, David Monahan organized a corporation known as Monahan Bros., which corporation did some business but ceased to exist in about one year after its organization. David Monahan was engaged continuously in 1910, and in 1916 had judgments outstanding against him in excess of $5000.00 and he was financially irresponsible. From 1909 to 1915 David Monahan was in the employ of other parties.

In the summer of 1916, the City of Wilmington advertised for bids for the construction of this sewer system and Monahan Bros., put in a bid which bid was the lowest and the contract was awarded to them. Accompanying the bid was a certified check for $5000.00 signed by James T. Monahan and Frank M. Ryan of the Citizens National and Trust Company being the bank with which applicants did business. The contract entered into between Monahan Bros. and the city of Wilmington began as follows: "This agreement made and entered into this 8th day of August, A.D. 1916, by and between James A. Monahan and James Monahan co-partners under the name and style of Monahan Bros., party of the first part, and the City of Wilmington, Will County, Illinois, a municipal corporation, party of the second part, and it is signed by Monahan Bros., James J. Stewart, Street Commissioner and the city of Wilmington. After the contract had been executed between Monahan Bros., and the city, a contract was entered into between the appellees and appellants for the materials which were used in the work and for which this suit was brought. This contract was signed by Monahan Bros., by David Monahan, and David Monahan testified that, at the time it was signed, he told appellees that he was the partners and that his brother, the appellant, was not the contractor. In the answer of the appellees to the first trial, in case 3893, it was admitted that the appellants were the parties who entered into the contract with the city of Wilmington.

In the answer to this bill, appellants alleged that "David Monahan carried on said business in the name of Monahan Bros., by virtue of his association with another of his brothers named Frank Monahan." During the progress of the work on the sewers, Frank Monahan was injured and a claim for his injuries was made to the surety company which had issued a policy covering the workmen on that job. The claim, as put in to the surety company, was for injuries to a workman and was not for injuries to a contractor or a sub-contractor. Appellants claim that David Monahan put in the bid for this work without their knowledge and consent and that they signed the contract solely for the purpose of enabling David Monahan to obtain the necessary bond, which he could not furnish in his own name because of his financial irresponsibility and that the appellants took no part in the prosecution of the work. The mayor of the City of Wilmington testified that the contract was with the appellants, and that James P. Monahan was in Wilmington on two or three different occasions while the work was going on, for the purpose of collecting money on the contract from the city. A bank account was opened in the name of appellants with the City National Bank of Wilmington at the time the work was begun, and bills were paid by check on this bank signed with the name of appellants. The mayor also testified that James P. Monahan told him that anything Dave did on the contract was all right. He testified that David Monahan never claimed to be the contractor, nor denied that the appellants were the real contractors, and that the city never consented to the assignment, or subletting, of the contract which was expressly prohibited except with the written consent of the city. February 21, 1918, James P. Monahan wrote a letter to the mayor in which he stated that appellants would take up the matter with Dave and have him take care of the sewer trenches as soon as the frost was out of the ground. On October 7, 1918 a letter signed by Monahan Bros., by James P. Monahan, stated that the bearer, Frank J. Monahan, was authorized to represent the appellants in all matters of settlement under the contract with the city. Appellants claimed that they

In the answer to this bill, appellants alleged that "David Monahan
carried on said business in the name of Monahan Bros., by virtue of
his association with another of his brothers named Frank Monahan."
During the progress of the work on the sewers, Frank Monahan was
injured and a claim for his injuries was made to the surety company
which had issued a policy covering the workmen on that job. The
claim, was as put in to the surety company, was for injuries to a
workman and was not for injuries to a contractor or a sub-contractor.
Appellants claim that David Monahan put in the bid for this work
without their knowledge and consent and that they signed the contract
solely for the purpose of enabling David Monahan to obtain the
necessary bond, which he could not furnish in his own name because
of his financial irresponsibility and that the appellants took no
part in the prosecution of the work. The mayor of the City of Wil-
mington testified that the contract was with the appellants, and that
David J. Monahan was in Wilmington on two or three different oc-
casions while the work was going on, for the purpose of collecting
money on the contract from the city. A bank account was opened in
the name of appellants with the City National Bank of Wilmington
at the time the work was begun, and bills were paid by checks on
this bank signed with the name of appellants. The mayor also testi-
fied that James P. Monahan told him that anything done at the
contract was all right. He testified that James P. Monahan
claimed to be the contractor, but claimed that the appellants were
the real contractors, and that the city never contracted at the
ment, or anything, of the contract which was unnecessarily prohibited
except with the written consent of the city. February 27, 1912,
James P. Monahan wrote a letter to the mayor in which he stated
that appellants would take up the matter with them and have him
take care of the sewer trenches as soon as the frost was out of
the ground. On October 7, 1912 a letter signed by Monahan Bros.
by James P. Monahan, stated that the surety, Frank J. Monahan, was
authorized to transact the business in all matters of particular
under the contract with the city. Appellants claimed that they

were plastering contractors and had never been employed in building sewers, but the evidence shows that in 1915 two sewer contracts were taken in the name of the appellants in the city of Joliet and in these contracts David Monahan directed the work.

Within ninety days after the first material was furnished by appellees, they had trouble in getting settlements with the appellants for the materials furnished and one of the appellees went to the office of the appellants, in the city of Chicago, and was told by James P. Monahan that he had already put quite a lot of money into the job and that he expected it to carry itself, and he urged Beatty not to get nervous, that the credit of James P. Monahan was good and that he had never had a judgment entered against him. On the first day of each month an itemized statement of the account was rendered by appellees to appellants. On November 6, 1916, a letter was sent to the appellants, addressed to their Chicago office, advising them that a balance of $3550.00 was due appellees. On June 4, 1917, appellees wrote appellants that they had stopped delivery of material because of non-payment of their bills and advised appellants that interest was being charged on the balance due. James P. Monahan then went to Wilmington and called on the appellees. He was angry because he was being charged interest. At that time, after the deliveries were stopped, notice of a lien was served, and after some negotiations, James P. Monahan offered to advance two thousand dollars on the balance and give appellees a note for the remainder, and a portion of this money, if not all of it, was subsequently paid. In August, 1919, one of the appellees went to the office of the appellants in Chicago and saw James P. Monahan, who complained that the City officials were not giving sufficient estimates and he said that the appellants would have to arrange to give appellees some new bond. The vouchers and bonds were put in the banks in the name of the appellants.

Notwithstanding all of this evidence, it is insisted that the appellants were not the contractors, but that David Monahan was the real contractor. In support of this contention, David Monahan

were plastering contractors and had never been employed in building sewers, but the evidence shows that in 1916 the sewer contracts were taken in the name of the appellants in the city of Joliet and in these counties [illegible] the work.

Within ninety days after the first material was furnished by appellees, they had trouble in getting settlements with the appellants for the material furnished and one of the appellees went to the offices of the appellants, in the city of Chicago, and was told by James P. Brennan that he had already [illegible] a lot of money into the job and that he expected it to carry itself, and he urged gently not to get nervous, that the credit of James P. Brennan was good and that he had never had a judgment entered against him. On the first day of each month an itemized statement of the account was rendered by appellants to appellees. On September 1, 1916, a letter was sent to the appellants, addressed to their Chicago office, [illegible] that [illegible] on the [illegible] 10 June 4, 1917, appellees made application that they had received delivery of material because of non-payment of their bills and notified appellants that interest was being charged on the balance due. James P. Brennan then went to Chicago and called on the appellants. He was angry because he was being charged interest. At that time, after the deliveries were stopped, notice of a lien was served, and after some negotiations, James P. Brennan offered to give two thousand dollars on the balance and give appellees a note for the remainder, and a portion of this money, if not all of it, was subsequently paid. In August, 1916, one of the appellees went to the offices of the appellants in Chicago and saw James P. Brennan, who complained that the City officials were not giving sufficient estimates and he said that the appellants would have to arrange to give appellees some new work. The vouchers were issued and in the books in the name of the appellants.

James Brennan all of this evidence, in the instance that the appellants [illegible] the contracts, but that Joseph Brennan was the real interested. In support of this contention, James Brennan

testified that he opened the bank account in the name of the appellants; that he issued the checks in their names; that the monthly accounts were rendered to him; that he did all the work, and used the name of the appellants for mere convenience. He testified that the two Joliet contracts were taken in the name of appellants but that he was, in fact, the contractor. Appellants will not be permitted to escape their financial liability on these grounds. The certified check accompanying the bid was furnished by them. They signed the contract. All of the business was done intheir name. They exercised authority over the work which was entirely inconsistent with the authority of any person who was not interested in the contract. They were familiar with all of the business as it was from time to time transacted. They will not be permitted to loan the use of their name and credit to this transaction, and, when there is a loss, escape financial responsibility on the ground that they were not the real contractors. To permit such a thing to be done, would be to open the door to fraud, and permit persons, who are financially irresponsible, to carry on business in the names of persons who are financially responsible, and then permit such latter persons to escape loss on the ground that they were not the parties in interest. By signing the contract, James P. Monahan and Edward Monahan became the real contractors; and their actions, both prior to the signing of the contract and after it was signed, confirmed the claim of the appellees that they were the parties who were actually engaged in the prosecution of the work, and for these reasons they are liable, for any materials purchased under the contract and used in the work. David Monahan was their agent and they are bound by any and all of his acts within the scope of his employment. His employment including making the contract with the appellees and the appellants are bound thereby.

Appellants claim that there is no competent evidence showing the appellees delivered the material for which they claim compensation. Under the answer which we have already referred to, appellants admit that the appellees were entitled to the balance of their

testified that he spoke the best account in the case of the appellants; that he learned the names in Scott county; that the entirely accounts were presented to him; that he did all the work, but used the name of the appellants for mere convenience. He testified that the two joint contracts were taken in the name of appellants but that he was, in fact, the contractor. Appellants will not be permitted to escape their financial liability on these grounds. The evidence clear establishes that all was transacted by them. They signed the contracts. All of the business was done in their name. They exercised authority over the work which was entirely incompatible with the authority of any person who was not interested in the contract. They were familiar with all of the business as it was from time to time transacted. They will not be permitted to loan the use of their name and credit to this transaction, and, when there is a loss, plead financial responsibility on the ground that they were not the real contractors. To permit such a thing to be done, would be to open the door to fraud, and permit persons, who are financially irresponsible, to carry on business in the name of persons who are financially responsible, and then permit such latter persons to escape loss on the ground that they were not the parties in interest. By signing the contract, Jones v. Bowman and Howard Bowman became the real contractors; and their testimony, both prior to the signing of the contract and after it was signed, confirmed the claim of the appellees that they were the parties who actually engaged in the prosecution of the work, and for those reasons they are liable, for any materials furnished under the contract and used in the work. David Bowman was their agent and they are bound by any and all of his acts within the scope of his employment. His employment including making the contract with the appellees and the appellants are bound thereby.

Appellants claim that there is no competent evidence showing the appellees delivered the material for which they claim compensation. Under the proof which we have already indicated to, appellants admit that the material was furnished by the appellees at the request of their

claim after the deduction of damages claimed as set off. Had appellees elected to stand by the allegations of this answer, no proof would have been required of appellees as to the amount of material furnished. Appellees saw fit, however, to introduce in evidence their books showing the amount due as alleged in the bill. The evidence shows that, at the time the materials furnished were delivered, a ticket was made for each delivery and one copy of the ticket was given to the appellants and the other copy was kept by the appellees. Later these tickets were copied into the journal. The original tickets and the journal were offered in evidence. The persons who made the tickets and the entries in the journal testified to their handwriting and that the entires were made in the usual course of business and they were true and correct. They also testified to the total amount of the material furnished, together with credits, deductions, and set offs and the balance due. The evidence shows that at the end of each month copies of the ledger were sent to the appellants together with letters in most of which the appellants were asked to look over the account and note any errors and return the same to the appellees in case there were any mistakes, but no errors were pointed out by the appellants. The evidence also shows that the materials noted in these tickets and journal were delivered to the appellants. The books were proven as required by statute and made a prima facie case in addition to the admissions of the answer. Presbyterian Church vs. Emerson, 66 Ill. 269; Trainor vs. German Savings Association, 102 Ill. App. 604; Garlick vs. Mutual Loan Association 129 Ill. App. 402.

Complaint is made that the chancellor refused to allow credit for inferior tile rejected, and for damages for delay to the digging machine caused by the rejection of inferior tile. The evidence shows that 43558 feet of tile were used and appellants claimed that at least one fourth of these tile were rejected and they only received credit for about 2700 feet. This was not a proper element of damage under the answer, and even if it had been, the evidence does not sustain the claim made by the appellants for the

claim after the deduction of damages claimed was set off. Had appellees elected to stand by the allegations of this answer, no proof would have been required of appellees as to the amount of material furnished. Appellees now ask, however, to introduce in evidence their books showing the account due as alleged in the bill. The evidence shows that, at the time the materials furnished were delivered, a ticket was made for each delivery and one copy of the ticket was given to the appellants and the other copy was kept by the appellees. Later these tickets were copied into the journal. The original tickets and the journal were offered in evidence. The persons who made the tickets and the entries in the journal testified to their handwriting and that the entries were made in the usual course of business and they were true and correct. They also testified to the total amount of the material furnished, together with credits, deductions, and set offs and the balance due. The evidence shows that at the end of each month copies of the ledger were sent to the appellants together with letters in most of which the appellants were asked to look over the account and note any errors and return the same to the appellees in case there were any mistakes, but no errors were pointed out by the appellants. The evidence also shows that the material noted in these tickets and journal were delivered to the appellants. The books kept were as required by statute and made a prima facie case in addition to the admissions of the answer. Presbyterian Church vs. Emerson, 66 Ill. 89; Trainor vs. German Savings Association, 102 Ill. 490; Bentley vs. Mutual Life Association 104 Ill. 64.

Complaint is made that the chancellor refused to allow credit for inferior tile rejected, and for damages for delay to the dig-ging machine caused by the rejection of inferior tile. The evidence shows that 45858 feet of tile were used and appellants claimed that at least one fourth of these tile were rejected and they only received credit for about 8700 feet. This was not a proper element of damages under the answer, and even if it had been, the evidence does not justify the claim made by the appellants. The im

reason that credits were allowed on the books of the appellees for inferior tile furnished. $2050.00 damages were claimed by reason of the ditching machine remaining idle for forty one days at $50.00 per day. The evidence does not sustain this claim. Part of this time the machine was broken down and could not be used. The machine took off the top of the ditch, but the bottom of the ditch was excavated by pick and shovel. The men behind the machine were not able to keep up with the machine so, when the machine did not work, the men were not delayed on the job. The materials were placed on the street by appellees as ordered and directed by appellants. The evidence shows that sometimes too much material was ordered and at other times not enough was ordered. The evidence on the whole was not sufficient to entitle appellants to a set off for either, or any, of the items of damage claimed in their answer.

The amount due from the city to appellants was $7682.70. The amount of liens allowed to all parties in the suit was in excess of this amount, hence all of the parties could not be paid in full out of the funds in the hands of the city, and personal judgments had to be rendered against the appellants for the balance due each claimant. The decree found that $3328.77 was due appellees from appellants. It provided that, of this amount, $2933.67 should be paid to the appellees from the money and bonds in the hands of the city, and a personal judgment was rendered against the appellants for the balance of $395.10. It is claimed by appellants that two judgments were, in fact, rendered by this decree against them, one for $3328.70, the full amount of the claim and another for $395.10 and that this was erroneous. When the decree is read in its entirety it will be found that it does not sustain this contention. It renders judgment for the full amount, and provides that a certain portion of it be paid out of funds in the hands of the city, and that the balance shall be paid by the appellants from their personal funds. The judgment is not double and is not

capable of the construction placed upon it by the appellants.

We find no reversible error and the judgment will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-

_____

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-one, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

6996 Agenda No. 18.

Fay Lewis and Bros. Company,
appellee,
vs.
Elizabeth Brown,
appellant,

Appeal from County Court
of Winnebago.

224 I.A. 626

PARTLOW, J.

Appellee, Fay Lewis and Bros. Company, began suit against appellant, Elizabeth Brown, before a justice of the peace to recover $259.62 for goods sold and delivered to Theodore Panagakis, which goods it was alleged were agreed to be paid for by appellant, Elizabeth Brown. Judgment was rendered against appellee for costs and an appeal was prosecuted to the county court of Winnebago County, where there was a trial by jury and a verdict against appellant for $271.53. There was a remititur for $11.91. Judgment was rendered for the balance and an appeal was prosecuted to this court.

Theodore Panagakis was engaged in business at 102 South Third street, in the City of Rockford, under the name of the Triangle Confectionery and Ice Cream Parlor. He had bought goods from appellee for a long time and these goods were charged tohim, delivered to his place of business, accounts were rendered to him and he had made various payments on account. The last goods were sold and delivered to him on October 8, 1919. On October 24, 1919, appellant bought a half interest in this store and a bill of sale was executed to her by Panagakis for the half interest, and in the articles of co-partnership Panagakis agreed to pay all bills for goods which had been delivered prior to that date. No goods were sold to the new firm by the appellee after October 24, 1919, and no credit was extended to appellant.

On November 3, 1919, Panagakis and appellant sold the store to Robert J. Hawkins and executed a bill of sale containing the

For Jones and Ellis, Plaintiffs

vs.

Elizabeth Jones,

Defendant.

Appeal from Dunn County Court

Mr. Justice.

224 L. 620

[illegible], J.

Appellee, The Dunn and Lumber Company, [illegible] appellant, Elizabeth Jones, [illegible] in the probate [illegible] January 8th, 1920, the probate court [illegible] Dunn County, which probate is now challenged [illegible] by appellant, Elizabeth Jones. [illegible] appellee for costs and [illegible] of Winnebago County, where she was a ward by [illegible] against appellant for $[illegible]. There was [illegible] Jones was returned for the following [illegible] to this court:

Theodore Jonesville was engaged in [illegible] sawyer, in the city of Menomonie, [illegible] Manufacturing and Ice Cream Company. [illegible] appellee for a long time [illegible] matrimony to his place of business, [illegible] and he had made various [illegible] noin and delivered to him on [illegible], 1918, appellant bought a half interest in this [illegible] of gain was executed to her by [illegible] for the half interest, and in the articles of [illegible] appellee agreed to pay all bills for goods which had been [illegible] in this [illegible] the goods were sold to the law firm by the appellee after [illegible] 28, 1919, and he really was [illegible] to appellant.

On December 2, 1919, Theodore and appellant [illegible] in which [illegible] Jones [illegible] a bill of sale [illegible]

following clauses: "Parties of the first part (the vendors) to pay all outstanding bills against the above described property up to the present time for all goods and merchandise which has been actually delivered. And the said parties of the first part do vouch themselves to be the true and lawful owners of the said goods, chattels and property, and have in themselves full power, good right and lawful authority to dispose of said goods, chattels and property in manner as aforesaid. And they do, for themselves and their heirs, executors and administrators, covenant and agree to and with the said party of the second part, to warrant and defend the said goods, chattels and property to the said party of the second part, his executors, administrators and assigns, against the lawful claims and demands of all and every person or persons whomsoever." A short time after November 3, 1919, Panagakis was adjudged a bankrupt. The stock of goods in question was sold under the bankruptcy proceedings. A part of the proceeds of the sale was paid to appellee and credited on the account of Panagakis.

The principal question in this case is as to the meaning of the language used in the bill of sale, and what part of the balance of the account of appellee the appellant was liable to pay.

The contention of the appellee is that where a contract is made for a valuable consideration between two parties for the benefit of a third party, that the third party may maintain an action for the breach of such contract, and that such contract is not within the Statute of Frauds, and that in this case when Panagakis and the appellant agreed in the bill of sale to Hawkins to pay all outstanding bills against the property that was a contract upon which the appellee could maintain a cause of action against appellant. In support of this contention the appellee cites Eddy vs. Robert, 17 Ill. 505; Brown vs. Strait, 19 Ill. 88; Bristow vs. Lane, 21 Ill. 194; Lithographing Company vs. Kerting, 107 Ill. 344, and Webster vs. Fleming, 178 Ill. 140.

following clauses: "Another of the first acts [illegible]
to pay all outstanding bills, [illegible]
up to the present time for all [illegible]
been actually delivered. [illegible]
do voucsh themselves to be the [illegible]
goods, chattels and property, and have in themselves full power,
good right and lawful authority to dispose of said [illegible],
chattels and property in manner as [illegible]. [illegible]
themselves and their heirs, executors and [illegible],
and agree to and with the said [illegible],
warrant and defend the said goods, chattels and [illegible]
said party of the second part, his successors, administrators
and assigns, against the lawful claims and demands of all
every person or persons whomsoever." [illegible]
3, 1919, [illegible]
in question was sold under the [illegible]
of the proceeds of the sale was paid to [illegible]
the account of [illegible].

The point at question in this case is [illegible]
the language used in the bill of sale, and [illegible]
balance of the account of [illegible]
[illegible].

The consideration of the [illegible]
sale for a valuable consideration [illegible]
benefit of a third party, but [illegible]
action for the benefit of such [illegible]
is not within the powers of [illegible]
[illegible] and the [illegible] in the bill of sale [illegible]
by his all outstanding bills [illegible]
contract upon which the [illegible]
against [illegible]. In [illegible] of this consideration the [illegible]
[illegible]

The cases cited by appellee announce correct propositions of law but they are not conclusive in this case. Under those authorities if it had been provided in the bill of sale to Hawkins that appellant assumed all debts of Panagakis for goods which had been purchased prior to the date of the bill of sale then the cases cited would be applicable here. The language of the bill of sale, however, is that the parties of the first part agree to pay all outstanding bills against the above described property up to the present time for all goods and merchandise which has been actually delivered. The term "above described property" means the property covered by the bill of sale; that is, the property which was actually in the store on November 3, the day the bill of sale was executed. This was not a contract to pay all of the indebtedness of Panagakis, but it was only an agreement to pay all bills against the property actually sold and delivered to Hawkins, and which goods were actually in the store and unpaid for on November 3, 1919. The appellant was liable under the bill of sale for a part only of appellee's account against Panagakis. The record does not show the value of any goods sued for by appellee which goods were on hand in the store on November 3. The goods were delivered at different times. Some of these dates appeared from the evidence and as to others there is no evidence showing the date of the delivery. The goods were candy and cigars and they do not naturally remain long in such a store, but they are sold out from day to day and other goods are brought in to take their place. In order for appellee to recover from appellant it was necessary to prove that the goods sold by appellee to the amount of this judgment were in the store when the sale to Hawkins was made on November 3, 1919, and that these goods had not been paid for. Probably some of the goods bought of appellee were in the store on that date, but in the present condition of the record it is a pure

matter of guess what their value was and how many of them were on hand. The case was apparently tried upon the theory that appellant agreed to pay all outstanding bills for all property that had been sold to Panagakis prior to November 3, but such is not the meaning of the language used in the bill of sale.

For this reason the evidence does not sustain the judgment and it will be reversed and the cause remanded.

Reversed and Remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-

_____

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-one, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

7012 Agenda No. 27.

Dennis K. Lindhout,
appellee,

vs.

Director General of Railroads,
appellant,

Appeal from Kankakee

PARTLOW, J.

224 I.A. 626

Appellee, Dennis K. Lindhout, obtained a judgment for $550.00 in the circuit court of Kankakee county against appellant, the Director General of Railroads, for damages to an automobile which, at the time of the accident, was being driven by J.C.K. Lindhout, who was a brother of appellee.

The declaration consisted of one count and charged general negligence. It is urged by appellant as a ground of reversal that the evidence fails to show any negligence on the part of the appellant, but that the evidence does show that the driver of the automobile was not in the exercise of due care and caution at the time of the accident.

The accident happened between nine and ten o'clock on the morning of December 19, 1919, at the crossing of the Illinois Central Railroad and the Lincoln Highway, about one thousand feet north of the depot at Matteson. There are four tracks at this point, extending north and south, which are numbered from one to four, Track No. One being the west track. The highway extends east and west and the roadway is paved. East of the railroad crossing, and about 300 feet from it, on the north side of the highway, was a sign on a post with the letters "R.R." on it. On the east side of the crossing and on the north side of the highway, about 30 feet from the east rail of the track was a sign on a post with the word "Stop" upon it, which sign had been placed there under orders of the Public Utilities Commission, as provided in Section 145-a, Chapter 121, Hurd's Statutes, 1919, page 2612. There was a bell on the crossing which began ringing

7012 Appeals No. 27.

Dennis K. Hindhaugh, appellee,	
vs.	Appeal from Kankakee
Director General of Railroads, appellant,	

JUDGE, J.

Appellee, Dennis K. Hindhaugh, obtained a judgment for $250.00 in the circuit court of Kankakee county against appellant the Director General of Railroads, for damages to an automobile which, at the time of the accident, was being driven by J.C.K. Hindhaugh, who was a brother of appellee.

The declaration consisted of one count and charged general negligence. It is urged by appellant as a ground of reversal that the evidence fails to show any negligence on the part of the appellant, but that the evidence does show that the driver of the automobile was not in the exercise of due care and caution at the time of the accident.

The accident happened between nine and ten o'clock on the morning of December 19, 1919, at the crossing of the Illinois Central Railroad and the Kankakee Highway, about one thousand feet north of the depot at Bradley. There are four tracks in this point, extending north and south, which are numbered from one to four, Track No. One being the east track. The highway extends east and west and the roadway is paved. West of the railroad crossing, and about 300 feet from it, on the north side of the highway, was a sign on a post upon which the letters "K.E." on it. On the east side of the crossing and on the north side of the highway, about 30 feet from the east rail of the track was a sign on a post with the word "STOP" upon it, which sign had been placed there under orders of the Illinois Commerce Commission on October 23, 1919. Tanner Ill. Rev. Stat. 1919,

automatically when a train was about 1200 feet distant from the crossing. A flagman was stationed on the crossing and he had a sign with the word "Stop" painted thereon. It seems to be conceded that the ground for 200 feet east of the track and for a distance of at least 500 feet south of the crossing was level, with nothing to obstruct the view from the crossing. Beginning at least 500 feet south of the crossing the tracks were below the surface of the surrounding ground. On the morning in question there was a very light snow on the ground but the weather was not very cold. J.C.K. Lindhout, the driver of the car, was a lawyer. He had been over the crossing many times and was familiar with the conditions there existing. On the day of the accident he approached the crossing from the east and drove west in a Hudson coupe. He testified that when he approached the crossing he looked to the north and then to the south but saw no train. He saw the flagman standing on the crossing with the sign in his hand hanging by his side, but heard no crossing bell ringing. The automobile was not traveling to exceed ten or twelve miles per hour, and when it was about twenty-five feet from the east rail the witness testified that the watchman put up his sign. Lindhour attempted to stop the automobile but it drifted on to the east track with the front wheels in the center thereof. Lindhout jumped from the automobile and it was struck by an express train going north on the east track and was a total wreck.

The flagman testified that the crossing bell began to ring when the train was 1200 feet south of the highway. He was in his shanty which was just west of the tracks and twelve or fourteen steps from the middle of the highway. When the bell began to ring he went outside, grabbed the "Stop" sign and walked 25 or 30 feet up the middle of the pavement and put up his sign, and at the time he put up the sign the automobile was 600 or 700 feet east of the track. The engineer of the

automatically when a train was about 1800 feet distant from the crossing. A flagman was stationed on the crossing and he had a sign with the word "Stop" painted thereon. It seems to be conceded that the ground for 800 feet east of the track and for a distance of at least 500 feet south of the crossing was level, with nothing to obstruct the view from the crossing. Beginning at least 800 feet south of the crossing the tracks were below the surface of the surrounding ground. On the morning in question there was a very light snow on the ground and the weather was not very cold. E.O.K. Lindbom, the driver of the car, was a lawyer. He had been over the crossing many times and was familiar with the conditions there existing. On the day of the accident he approached the crossing from the east and drove west in a Hudson coupe. He testified that when he approached the crossing he looked to the north and east, to the south but saw no train. He saw the flagman standing on the crossing with the sign in his hand hanging by his side, but heard no crossing bell ringing. The automobile was not traveling to exceed ten or twelve miles per hour, and when it was about twenty-five feet from the east rail the witness testified that the watchman set up his sign. Lindbom attempted to stop the automobile but it skidded on to the east track with the front wheels in the center thereof. Lindbom jumped from the automobile and it was struck by an oncoming train coming north on the east track and was a total wreck.

The flagman testified that the crossing bell began to ring when the train was 1800 feet south of the highway. He was in his shack, which was just west of the tracks and twelve or fourteen steps from the middle of the highway. When the bell began to ring he went outside, reached the "Stop" sign and walked 25 or 30 feet up the middle of the crossing and waved his sign, and at the time he was in the act of stopping the automobile was due or 100 feet east of the track. The engineer of the

train testified that when he first saw the automobile it was going eight to twelve miles per hour and was about 400 or 500 feet east of the track. He whistled twice for the section men who were sweeping snow south of the crossing. He then whistled for the crossing, and when he discovered that Lindhout did not see the train he whistled a succession of short blasts. He testified that the train was going 20 to 25 miles per hour. J. C. Porter, a civil engineer, testified that the natural ground began to rise above the level of the tracks some little distance south of the highway, so that at a point 750 feet south of the crossing, the natural elevation of the ground was four feet above the rail. At 1100 feet south of the highway the embankment, on the east side of the right of way, was 10.2 feet above the top of the rail. At a distance of 100 feet east from the track, on the highway, you could see at least a quarter of a mile down the track. at 200 feet east from the east rail of the track on the highway, looking south, you could see a train at the water tank which was about 1400 feet south of the crossing.

There may be some other facts in evidence which have some hearing on the question at issue but the principal facts are as above set forth. The question for our determination is whether this evidence shows such a want of due care on the part of the driver of the automobile as will bar a recovery. Section 145-a, Chapter 121, Hurd's Statutes, 1919, page 2612, provides that it shall be the duty of the highway commissioners to erect and maintain such signs as the Public Utilities Commission may prescribe, alongside the roadway of the highway at a distance of 300 feet on either side from every grade crossing located in the various townships and road districts of the state designated as extra hazardous by the Public Utilities Commission. The same section also provides that if in the case of any such crossing, it appears that the presence of such signs is unnecessary

train travelled fast when he first saw the locomotive it was going eight to twelve miles per hour and was about 400 or 500 feet east of the track. He whistled twice for the section men who were sweeping from south of the crossing. He then whistled for the crossing, and when he discovered that Lindsay did not see the train he whistled a succession of short blasts. He testified also the train was going up at a slow speed.

J. C. Porter, a civil engineer, testified that the natural ground began to rise above the level of the track some little distance south of the highway, so that at a point 750 feet south of the crossing, the natural elevation of the ground was four feet above the rail. At 1100 feet south of the highway the embankment, on the east side of the right of way, was 10.2 feet above the top of the rail. At a distance of 100 feet east from the track, on the highway, you could see at least a quarter of a mile down the track. At 400 feet east from the east rail of the track on the highway, looking south, you could see a train at the water tank which was about 1400 feet south of the crossing.

There may be some other facts in evidence which have some bearing on the question at issue but the principal facts are as above set forth. The question for the determination is whether this evidence shows such a want of due care on the part of the driver of the automobile as will bar a recovery. Section 1212, Chapter 121, Ward's statutes, 1919, page 2019, provides that it shall be the duty of the highway commissioners to erect and maintain proper signal on the public highways, and provides that public, alongside the roadway of the highway at a distance of 300 feet on either side from every grade crossing located in the various townships and road districts of the state legislature or in which reservoirs by the public utilities commission. The same section also provides that if in the case of any such crossing, it appears that the presence of such signs is unnecessary

the Public Utilities Commission, on petition of the highway commissioners of the township or road district in which such crossing is situated, may release such township or road district of the obligation of placing or maintaining such signs on the highway near such crossing. Section 145-b of the same chapter provides that upon approaching any highway crossing and railroad at grade, the person controlling the movement of any self-propelled vehicle shall reduce the speed of such vehicle to a rate of speed not exceeding ten miles per hour, and at all grade crossings at which such signs are placed, the person controlling the movement of any self-propelled vehicle, shall bring such vehicle to a full stop at such stop sign before proceeding over the railroad tracks.

This crossing in question had been designated as extra hazardous by the Public Utilities Commission and the stop sign had been placed there by order of the commission as provided in the above section. Under these circumstances it was the duty of the driver of the automobile to come to a full stop before proceeding across the tracks. If he had obeyed the law in this regard the accident would have been avoided. This failure to obey the law was, alone and of itself, a bar to the right of recovery. The appellee contends that this section of the statute is unconstitutional and void, but that question cannot be determined by this court.

Regardless of this section of the statute, the other evidence in the case shows that the driver of the automobile was guilty of contributory negligence. He was familiar with all of the conditions at this crossing and had passed over it on many occasions. He admitted that 200 feet east of the crossing he could see at least 500 feet south down the tracks, and other evidence in the case tends to show that a person could see much farther than 500 feet. He admits he saw the flagman on the crossing. The fact that the flagman was on his way to the center of the crossing

the Public Utilities Commission, in writing, if the highway commissioners of the [illegible] in which such crossing is situated, may relieve such township or road district of the obligation of placing or maintaining such signs on the highway near such crossing. Section 148-b of the same chapter provides that [illegible] and railroad at grade, the person controlling the movement of any self-propelled vehicle shall reduce the speed of such vehicle to a rate of [illegible] per hour, and at all grade crossings at which such signs are placed, the person controlling the movement of any self-propelled vehicle, shall bring such vehicle to a full stop at [illegible] before proceeding over the railroad tracks.

This crossing in question had been designated as extra hazardous by the Public Utilities Commission and the signs had been placed there by order of the commission as provided in the above section. Under these circumstances it was the duty of the driver of the automobile to come to a full stop before proceeding across the tracks. If he had obeyed the law in this regard the accident would have been avoided. This failure to obey the law was, alone and of itself, a bar to the right of recovery. The appellee contends that this section of the statute is unconstitutional and void, but this question is foreclosed by this court.

Regardless of this section of the statute, the court instructed in the case that the driver of the automobile had a right to assume that the railroad company, negligence. He was familiar with all of the conditions at that crossing and had passed over it on many occasions. He admitted that [illegible] of the crossing he could see at least 300 feet with the [illegible], and that [illegible] the same back 17 feet with a [illegible] would [illegible] 300 feet. He admits he saw the engine on the track. The fact that he [illegible] and he did see it, [illegible]

was sufficient to warn him that a train was approaching, and if he had looked he could have seen the train in ample time to have stopped before reaching the tracks. He wants it understood that he did not stop because the flagman's sign was hanging at his side and was not held upright until the automobile was 25 feet from the crossing. He had no right to rely entirely upon the flagman. It was his duty to use his faculties to ascertain for himself whether a train was approaching. There is evidence tending to show that trains going north usually went on track two instead of track four and that this driver thought this train was on track two, and for that reason permitted his automobile to cross track four! That was no excuse for not looking and listening. The warning signs were in position, the crossing bell was ringing, the flagman was on the crossing, the whistle of the engine was blowing, and in spite of all these facts the driver drove on to the track and the automobile was struck. The evidence shows that the driver was guilty of such contributory negligence as bars a recovery.

No specific act of negligence is alleged in the declaration against appellant, but appellee insists that the flagman was guilty of negligence in failing to flag the driver of the automobile in time to avoid the accident, and that the engineer of the train was guilty of negligence, because he saw the automobile when it was 400 to 500 feet from the track going eight to twelve miles, and that he did not discover that the driver of the automobile did not see the train until the engine was 200 feet from the crossing, and yet the engineer made no attempt to stop the train until the engine was 30 or 40 feet from the crossing when the engineer applied the air and reversed the engine.

The evidence of the contributory negligence of the driver of the automobile, in a large measure, answers the charge of negligence alleged against the flagman and the engineer. This crossing safeguarded the traveling public probably as well, if not better, than the average grade crossing. It was provided

was sufficient to warn him that a train was approaching, and if he had looked he could have seen the train in ample time to have stopped before reaching the track. It seems to be admitted that he did not stop because the flagman's sign was hanging at his side and was not held upright until the automobile was 25 feet from the crossing. He had a right to rely entirely upon the flagman. It was his duty to use his faculties to ascertain for himself whether a train was approaching. There is evidence tending to show that trains going north usually pass on track two instead of track four and that this driver thought this train was on track two, and for that reason permitted his automobile to cross track four. That was no excuse for not looking and listening. The warning signs were in position, the crossing bell was ringing, the flagman was on the crossing, the whistle of the engine was blowing, and in spite of all these facts the driver drove on to the track and the automobile was struck. The evidence shows that the driver was guilty of such contributory negligence as bars a recovery.

No specific act of negligence is charged to the railroad company by appellant, but appellee insists that the flagman was guilty of negligence in failing to flag the driver in the automobile in time to avoid the accident, and that the engineer of the train was guilty of negligence, because he saw the automobile when it was 400 to 500 feet from the track going eight to twelve miles, and that he did not discover that the driver of the automobile did not see the train until the engine was 100 feet from the crossing, and yet the engineer made no attempt to stop the train until the engine was 50 or 60 feet from the crossing when the engineer applied the air and reversed the engine.

The evidence of the satisfactory warnings of the driver of the automobile and of the flagman, proves the absence of negligence charged against the flagman and the engineer. This proves the contributory negligence of the driver of the automobile, as well, if not better, than the strongest prima facie showing. It was practically

with most all of the usual methods of protection except gates. When the train was almost a quarter of a mile away the flagman came out of his shanty, took up his stop sign and started for the middle of the crossing. There is no evidence that he did not go promptly to his post of duty. The only negligence which can be urged against him is the claim of the driver of the automobile that he did not raise his sign until the automobile was within 25 feet of the track. In this he is contradicted by the flagman, who testified that he raised his sign when the automobile was between 600 and 700 feet east of the track. The fact that the flagman came out of his shanty, picked up his sign and started for the middle of the crossing should have been sufficient warning to the driver that the train was approaching. The driver of the automobile admitted on cross-examination that he did not know whether he looked to the south when he was within 200 feet of the crossing, and that if he had looked he could have seen the train. He also testified that he did not know how far he was from the east track when the flagman came out of his shanty; that the flagman might have been out there all the time; that he had no distinct recollection of seeing the flagman step out of his shanty, and that the first he saw of the flagman he was south of the crossing of the highway and the track, right around where the shanty was, and the flagman then started to walk toward the crossing with the sign by his side. The evidence shows that the train was running from 20 to 40 miles an hour. The engineer blew his whistle, not only for the crossing, but he blew it for the section gang before he blew it for the crossing, and then blew it several blasts after he blew for the crossing when he saw that the automobile was not going to stop. Under this state of the proofs we cannot say that the evidence shows that either the flagman or the engineer was guilty of negligence which contributed to the accident.

Complaint is made that the court, over the objection of the appellant, permitted the driver of the automobile in rebuttal, to

with not all of the usual methods of protection except gates. When the train was almost a quarter of a mile away the flagman came out of his shanty, took up his stop sign and stepped for the middle of the crossing. There is no evidence that he did not go promptly to his post of duty. The only negligence which can be urged against him is the claim of the driver of the automobile that he did not raise his stop sign until the automobile was at least at the crossing. He this he is contradicted by the flagman, who testified that he raised his sign when the automobile was between 200 and 300 feet away from the crossing. The fact that the flagman came out of his shanty, picked up his sign and stepped for the middle of the crossing should have been sufficient warning to the driver that the train was approaching. The driver of the automobile admitted on cross-examination that he did not have anything to look to the right when he was within 50 feet of the crossing, and that if he had looked he could have seen the train. He also testified that he did not know how far he was from the east track when the flagman came out of his shanty; that the flagman might have been out there all the time; that he had no distinct recollection of seeing the flagman step out of his shanty, and that the first he saw of the flagman is near South of the crossing of the highway and the track, right around where the shanty was, and the flagman then started to walk across the crossing with the sign by his side. The evidence shows that the train was moving from 40 to 45 miles an hour. The engineer blew his whistle, and yet, for the crossing, not be blow it for the station long before he blew it for the crossing, and then blew it several blasts after he blew for the crossing when he saw that the automobile was not going to stop. Under this state of the proofs we cannot say that the evidence shows that either the flagman in the engineer was guilty of negligence which contributed to the accident.

Complaint is made that the court, over the objections of the appellant, permitted the driver of the automobile to testify. He testified the driver of the automobile is interest. He

testify to a conversation with the flagman in which the driver testified that he asked the flagman why he did not get out there quicker and hold up his sign, and the flagman replied that he did not do so because he thought it was a regular passenger train coming down the regular passenger track which was track two. This evidence was admitted upon the theory that it was a part of the res gestae. The proof shows that after the collision and after the passenger train had stopped, the rear end of the train was at least 100 feet south of the crossing, and the driver of the automobile walked south 100 feet around the end of the train, thence north 100 feet, and west to where the flagman was standing, at which point and time this conversation took place. If this conversation was not a part of the res gestae, still it was not controlling in this case.

Complaint is made of the first and second instructions given on behalf of appellee, of the refusal of the court to give the tenth and eleventh instructions offered on behalf of the appellant and cross-errors have been assigned as to the seventh and ninth instructions given on behalf of the appellant. We do not think the first instruction is subject to much of the criticism urged against it, and in some respects it has been approved by the Supreme Court, but it is awkwardly drawn and might be difficult for the jury to understand. The second instruction should have omitted the words "you may believe from the evidence that" as they appear in the first and second lines and when these words are omitted the remainder of the instruction is correct. The tenth and eleventh instructions refused were covered by others given, and the seventh and ninth given are not subject to the criticism made against them.

The judgment will be reversed with a finding of fact.

Judgment reversed with a finding of fact.

We find that at the time of the accident in question, the driver of ~~appellants~~ appellee's car was guilty of such contributory negligence as bars a recovery in this case.

testify to a conversation with the flagman in which the driver testified that he asked the flagman why he did not get out the spider and hold up his sign, and the flagman replied that he did not do so because he thought it was a regular passenger train coming from the regular passenger track which was track two. This evidence was admitted upon the theory that it was a part of the res gestae. The proof shows that after the collision and after the passenger train had stopped, the rear end of the train was at least 100 feet south of the crossing, and the driver of the automobile walked south 100 feet around the end of the train, thence north 100 feet, and went to where the flagman was standing, at which point and time this conversation took place. Upon cross-examination was his a part of the res gestae, still it was not controlling in this case.

Complaint is made of the first and second instructions given on behalf of appellee, of the refusal of the court to give the tenth and eleventh instructions offered on behalf of the appellant and cross-errors have been assigned as to the seventh and eighth instructions given on behalf of the appellant. We do not think the first instruction is subject to much of the criticism urged against it, and in some respects it has been approved by the Supreme Court, but it is obviously from our place in criticism on the jury to misunderstand. The second instruction should have modified the words "you may believe from the evidence that" so that it would read "if you believe from the evidence that" as has been done in the first and second lines and when again in the second the remainder of the instruction is correct. The tenth and eleventh instructions refused were covered by others given, and the seventh and eighth given are not subject to the criticism made against them.

The judgment will be reversed with a finding of fact.

Judgment reversed with a finding of fact.

In the Court at the time of the argument in question, the driver of [illegible] not any policy of such particularly [illegible] guard as body a [illegible] in this case.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 13th day of March in the year of our Lord one thousand nine hundred and twenty-two

Justus L. Johnson

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-one, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

7035 Agenda No. 39

The People of the State of Illinois, appellee,	)	Appeal from County Court of Knox.
vs.	)	
August Swanson, appellant,	)	

PARTLOW, J.

August Swanson was found guilty in the county court of Knox county on the charge of bastardy. Judgment was rendered upon the verdict and an appeal has been prosecuted to this court.

The evidence shows that appellant was a single man, thirty-seven years old, and resided on a farm in De Kalb county. Ethel Moshier, the prosecuting witness, was a girl eighteen years of age. She had been committed to the Geneva School for Girls, and by the authorities of that institution had been placed in the home of a farmer by the name of Entwhistle, who lived a short distance from appellant. The prosecuting witness testified that on the first or second Sunday in August, 1920, she was taken for an automobile ride by appellant and Dee Nicholson, a boy fifteen years of age. They drove many miles from her home to a lonely road in the woods, where she claims the intercourse took place between her and the appellant. This act of intercourse is denied by the appellant. Dee Nicholson, the boy, had been in the St. Charles School for Boys and was then, and at the time of the trial, living with and working for appellant. Nicholson testified that he had intercourse with the prosecuting witness at or near the time in question. This was denied by the prosecuting witness. Before the child was born the prosecuting witness went to the home of her mother in Galesburg, Knox County, where the child was born.

In the county court appellant moved th quash the complaint because it was fatally defective, the motion was overruled and

7028 Agenda No. 32

The People of the State of Illinois, Appellee, vs. Oscar Swanson, Appellant.	Appeal from County Court of Knox.

22412A. 629

MARTIN, J.:

Appellant Swanson was found guilty in the county court of Knox county on the charge of bastardy. Judgment was rendered against the relator and an appeal has been prosecuted to this court.

The evidence shows that appellant was a single man, thirty-seven years old, and resided on a farm in Knox county. Ethel Swanson, the prosecuting witness, was a girl eighteen years of age. She had been employed in the country during her girlhood, and by the substance of that instruction had taken charge in the home of a farmer by the name of Hewhardie, who lived a short distance from appellant. The prosecuting witness testified that on the first or second Sunday in August, 1920, she was taken for an automobile ride by appellant and Lee Nicholson, a boy fifteen years of age. They drove many miles from her home to a lonely road in the woods, where she claims the intercourse took place between her and the appellant. This act of intercourse is denied by the appellant. Lee Nicholson, the boy, had been in the st. Charles School for Boys and was then, and at the time of the trial, living with and working for appellant. Nicholson testified that he had intercourse with the prosecuting witness at or near the time in question. This was denied by the prosecuting witness. Before the child was born the prosecuting witness went to the home of her mother in Galesburg, Knox county, where the child was born.

In the county court appellant moved to quash the complaint because it was defective, the motion was overruled and

this ruling is assigned as error. The complaint alleged "that Ethel Moshier, an unmarried woman of the County of Knox and State of Illinois, on oath states that she has been delivered of a male child which, by law, is deemed a bastard and that August Swanson is the father of such child." Section 1, Chapter 17, Hurd's Statutes of 1919, page 156, provides that when a woman who shall be pregnant, or delivered of a child which by law shall be deemed a bastard, shall make complaint to a justice of the peace or a judge having jurisdiction herein, in the county where she may be pregnant, or delivered, or the person accused may be found, and shall accuse, under oath, a person with being the father of such child, it shall be the duty of such judge or justice to issue a warrant against the person so accused. The complaint was entirely lacking in allegations of jurisdiction of the justice before whom the complaint was filed. It did not allege that it was made before a justice of the county where the complaining witness was pregnant, or delivered, or where the person accused was found. The complaint was insufficient to justify the issuance of a warrant. Maynard vs. The People, 135 Ill. 416. The warrant, however, was issued and served upon the appellant. He appeared, submitted himself to the jurisdiction of the justice, made no motion to quash the complaint, and was bound over to the county court. In the county court, for the first time, he made the motion to quash. A bastardy case is a civil proceeding and not a criminal case. McCoy vs. People, 71 Ill. 111; Rawlings vs. People, 102 Ill. 475, Scharf vs. People, 134 Ill. 240. The want of allegations of jurisdiction may be waived by the defendant who voluntarily appears and does not question the jurisdiction of the court. Maynard vs. People, supra, The evidence shows that the warrant was issued by a justice of the peace of the county where the prosecuting witness was delivered of her child and for that reason the justice had jurisdiction of the subject matter. The failure to allege it in the complaint was waived by the appellant.

this ruling be maintained as error. The complaint charges that Ethel Moehlor, an unmarried woman of the county of Knox and state of Illinois, on oath states that she has been delivered of a male child which, by law, is deemed a bastard and that August Swanson is the father of such child." Section 1, Chapter 17, Hurd's Statutes of 1919, page 186, provides that when a woman who shall be pregnant, or delivered of a child which by law shall be deemed a bastard, shall make complaint to a justice of the peace or a judge having jurisdiction herein, in the county where she may be pregnant, or delivered, or the person accused may be found, and shall assess, under oath, a person with being the father of such child, it shall be the duty of such judge or justice to issue a warrant against the person so accused. The complaint was entirely lacking in allegations of jurisdiction of the justice before whom the complaint was filed. It did not allege that it was made before a justice of the county where the prosecuting witness resided, or delivered, or where the person charged was found. The complaint was insufficient to justify the issuance of a warrant. Maynard vs. The People, 156 Ill. 416. The warrant, however, was issued and served upon the appellant. He appeared, submitted himself to the jurisdiction of the justice, made no motion to quash the complaint, and was bound over to the county court. In the county court, for the first time, he made the motion to quash. A bastardy case is a civil proceeding and not a criminal case. Bailey vs. People, 71 Ill. 332; Hastings vs. People, 86 Ill. 474; Hurd vs. People, 144 Ill. 626. The rule of objections of jurisdiction may be waived by the defendant and ordinarily cannot be not even raised question the jurisdiction of the court. Bennett vs. People, 3 Ill. App. 3. The evidence shows that the warrant was issued by a justice of the peace of the county where the prosecuting witness was delivered of her child and that the justice had jurisdiction of the subject matter. The objections to venue or to the complaint were waived by the appellant.

The prosecuting witness testified that she had intercourse with appellant along the highway between Oscar Swanson's and Emmel Larson's before March 15, and that she walked along that road with the appellant. The appellant denied this and offered to prove by Oscar Swanson, who lived on this road, that he had never seen appellant walking along the highways past his house in the evening. Similar questions were asked the witness Nicholson. An objection was sustained to this evidence and this ruling is assigned as error. The evidence was negative in character. Its force and effect would depend upon the time of day or night the alleged meetings took place. The questions were not limited to any particular hour of the day or night and even if they had been, their answers would have thrown no light on the question at issue. No error was committed in this ruling.

The last part of the first instruction given on behalf of appellant told the jury that "if you believe that any witness testified falsely as to any material fact in the case, then you are at liberty to disregard such evidence by said witness unless the same is corroborated by other credible evidence in the case." It does not follow merely because a witness made an untrue statement that his entire testimony is to be disregarded. This must depend upon the motive of the witness. If he intentionally swears falsely as to one matter the jury may properly, unless he is corroborated, reject his whole testimony as unworthy of credit. But if he makes a false statement through mistake, or forgetfulness, or misapprehension that ought not to discredit his testimony entirely. It is only where a witness knowingly and wilfully gives false testimony that his evidence may be rejected. Under the rule announced in Overtoom vs. Chicago and Eastern Illinois Railway Company, 181 Ill. 323; Godair vs. The Hamm National Bank, 225 Ill. 572, the first instruction given omitted the allegations of wilfully and knowingly testifying falsely and, therefore, was erroneous. The thirty-third instruction offered on behalf of

The prosecuting witness testified that she had intercourse with appellant along the highway between Jacob Jackson's and Samuel Larson's before March 15, and that she walked along that road with the appellant. The appellant denied this and attempted to prove by Oscar Swanson, who lived on this road, that he had never been accustomed walking along the highways past his house in the evening. Similar questions were asked the witness Nicholson. An objection was sustained to this evidence and this ruling is assigned as error. The evidence was negative in character. Its force and effect would depend upon the time of day or night the alleged meetings took place. The questions were not limited to any particular hour of the day or night and even if they had been, their answers would have thrown no light on the question at issue. No error was committed in this ruling.

The last part of the first instruction given on behalf of appellant told the jury that "if you believe that any witness testified falsely as to any material fact in the case, then you are at liberty to disregard such evidence by said witness unless the same is corroborated by other credible evidence in the case." It does not follow merely because a witness made an untrue statement that his entire testimony is to be disregarded. This must depend upon the motive of the witness. If he intentionally swears falsely as to one matter the jury may properly, unless he is corroborated, reject his whole testimony as unworthy of credit. But if he makes a false statement through mistake, or forgetfulness, or misunderstanding and not with the intention to deceive, it is only where a witness knowingly and willfully gives false testimony that his evidence may be rejected. Under the rule announced in Overtook vs. Chicago and Eastern Illinois Railway Company, 181 Ill. 322; Godair vs. The Chicago & Tipton Road, 148 Ill. 574, the court instructed plaintiff's witnesses if all-fully and knowingly testified falsely, their testimony was stricken out. The trial court committed no error in refusing to give the instruction.

the appellant and refused by the court, correctly announced this rule of law and should have been given by the court in place of the first instruction.

The sixth instruction told the jury that if they believe from a preponderance of the evidence that the prosecuting witness was mistaken as to the day of the conception, yet if they believed from a preponderance of the evidence that the defendant was the father of the child, they should find the defendant guilty! In Matteson vs. The People, 122 Ill. App. 66, this court had occasion to consider an instruction almost identical with the sixth instruction given in this case, and we there held that, under the facts of that case, the instruction was erroneous and should not have been given. The facts in this case are almost identical with the facts in the Matteson case and for the same reason announced in that case it was error to give the sixth instruction.

Complaint is made of the second instruction given on behalf of the appellee and of the refusal of the court to give several instructions offered on behalf of the appellant. We have examined all of these instructions and are of the opinion that no error was committed in the giving or refusing of any of them.

In support of his motion for a new trial appellant filed four affidavits setting up certain conversations with the prosecuting witness which tended to show great familiarity between the prosecuting witness and Dee Nicholson, and possibly improper conduct between them during the first part of April, 1920; also reciting certain evidence in rebuttal based on the court reporter's notes taken at the preliminary hearing. It is alleged that this was newly discovered evidence which entitled the appellant to a new trial. The rule is that a new trial will not be granted on the grounds of newly discovered evidence which is merely cumulative or impeaching and is not conclusive in character. In no case will newly discovered evidence be sufficient to require a new trial,

the children are defined by the court, although, nevertheless, they are of an age which have been given by the court to elect or give their testimony.

The state identifies this as the fact of the matter from a preponderance of the evidence and the corresponding minor was minister of the law of the commonwealth, in the state without from a preponderance of the evidence that the defendant was the father of the child, they should find the defendant guilty. In Mattison vs. The People, 152 Ill. App. 64, this court had occasion to construe an instruction almost identical with the instruction given in this case, and in that case, under the facts of that case, the instruction was erroneous and should not have been given. The facts in this case are almost identical with the facts in the Mattison case and for the same reason announced in that case it was error to give the state's instruction.

Complaint is made of the second instruction given on behalf of the defendant and of the refusal of the court to give several instructions offered on behalf of the appellant. We have examined all of these instructions and are of the opinion that no error was committed in the giving or refusing of any of them.

In support of his motion for a new trial, appellant filed four affidavits setting up certain conversations with the prosecuting witness which tended to show that the prosecuting witness had stated to some jurors that the defendant was the father of the child, and that the prosecuting witness had testified that the defendant is not. Only one material variation between the testimony of the witnesses in question and the testimony given by the witness in the trial was in regard to the conversation between the witness and the jurors. It is claimed that this was newly discovered evidence which entitles the appellant to a new trial. The rule in this state has been well laid down in the opinion of this court in Chicago Rapid Transit Co. vs. Mahoney, 174 Ill. 320, where it is said: "Generally speaking, a motion for a new trial on the ground of newly discovered evidence will not be allowed if the evidence is merely cumulative or impeaching, and it is not probable that it would change the result if a new trial should be granted.

unless diligence is shown to have been exercised to discover it prior to the trial. Spahn vs. The People, 137 Ill. 538; William vs. The People, 164 Ill. 481; Elzas vs. Elzas, 183 Ill. 132. The most that can be said of the evidence set up in these affidavits is that it merely corroborates other evidence which was already in the case and was not of that character which would justify a new trial on that ground. The affidavits do not show such diligence on the part of the appellant as would entitle him to a new trial.

It is contended by appellant that the verdict is contrary to the weight of the evidence. As the judgment will have to be reversed on other grounds, we have purposely refrained from commenting upon the evidence, or stating any more of the facts than were necessary to be stated in order to properly consider the question raised in this appeal. The evidence was in sharp conflict and to say the least was exceedingly close. Under these circumstances it was of the utmost importance that the jury should have been properly and correctly instructed as to the law applicable to the facts of the case. Perkins vs. Knisely, 204 Ill. 275. The jury was not correctly instructed as to the law applicable to the facts in the case, and for that reason the judgment will be reversed and the cause will be remanded for a new trial.

Reversed and remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 13th day of March in the year of our Lord one thousand nine hundred and twenty-two

Justus L. Johnson

Clerk of the Appellate Court.

223 - 26683

WILLIAM H. HOLMES,
Appellee,

vs.

LEO GINTER,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

224 I.A. 627

MR. PRESIDING JUSTICE SNIDLEY DELIVERED THE OPINION OF THE COURT.

On September 7, 1920, plaintiff filed in the Municipal Court a complaint in forcible detainer, alleging that he is entitled to the possession of the first flat west, consisting of four rooms, at No. 1727 Lunt avenue, Chicago, and that Leo Ginter unlawfully withholds possession thereof from him. On September 21, 1920, the cause was tried without a jury, resulting in the court finding the defendant guilty as charged, and the court adjudged that plaintiff recover possession of the premises and that a writ of restitution issue. This appeal followed.

It appears from the stenographic report of the proceedings on the trial that plaintiff was the owner of the premises; that his agent, Acker, caused a written notice, signed in the name of plaintiff as owner, dated July 31, 1920, and addressed to defendant, to be personally served on said date upon Mrs. Leo Ginter, wife of defendant and a person above the age of 12 years residing on or being in charge of the premises, notifying defendant that plaintiff has elected to declare and does declare defendant's lease of the premises terminated on and after August 31, 1920, and directing defendant to vacate the premises and surrender possession thereof on or before said date; that on August 25, 1920, Acker caused another written notice, similarly signed and addressed to defendant, to be personally

served upon defendant's wife, then residing on or being in charge of the premises, notifying defendant that the sum of $18 was due for rent; that said sum of $18 was not paid; and that at the time of the filing of the complaint and at the time of the trial the defendant was still in possession of the premises. Defendant and his wife were both called as witnesses and from their testimony it further appears that defendant did not have a written lease of the premises but had been occupying the same for several years as a tenant from month to month.

Several technical points are raised by counsel for defendant as grounds for a reversal of the judgment. We have considered all of them and deem them to be without merit. It clearly appears that defendant's tenancy was only from month to month, that a thirty day notice of termination of that tenancy was given by the landlord under the statute, that a sufficient service of that notice was made, and that at the time of the commencement of the suit, which was more than thirty days after the service of that notice, the defendant was still in possession of the premises. After the service of such a notice, no further demand or notice was necessary before filing a complaint in forcible detainer. (Sec. 7, Chap. 80, Ill. Stat.) The notice of August 25, 1920, was unnecessary and was properly disregarded by the trial court. The judgment is affirmed.

AFFIRMED.

Barnes and Morrill, JJ., concur.

[illegible] [illegible] [illegible] [

248 - 26908

WILLIAM H. BUSH,
Appellee,

vs.

SAMUEL L. HAUSMAN,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On September 20, 1920, plaintiff filed in said Municipal Court a complaint in forcible detainer alleging that he was entitled to the possession of certain premises, to-wit, the two story frame building known as No. 116 Ohio Street, Chicago, and that the defendants Samuel L. Hausman and F. M. Duncan, were unlawfully withholding the possession thereof from him. The cause was tried before a jury and, after hearing evidence offered by both parties and after plaintiff had dismissed the suit as to Duncan, the court, at plaintiff's request, instructed the jury to find Hausman guilty and that the right to the possession of the premises was in the plaintiff. The jury returned such a verdict and the court entered the usual judgment and Hausman appealed. No brief has been filed by appellee (plaintiff) in this appellate court.

It appears from a written lease, dated April 17, 1920, and which was introduced in evidence, that the plaintiff, Bush, leased the premises in question to Duncan from May 1, 1920, until April 30, 1921, "unless sooner terminated as hereafter provided," at a rental of $480, in monthly installments of $40, each in advance. In a succeeding paragraph of the lease it was expressly agreed that "the party of the first part (Bush) reserves the right to cancel and terminate this lease at any time upon giving said party of the second part (Duncan) sixty

232 mis

days prior written notice of his intention so to do," and that such notice "posted on the within demised premises, or deposited in the United States mail, postage prepaid, addressed to said second party at 116 East Ohio Street, Chicago, Illinois, shall be considered sufficient notice hereunder." It further appears that about June 7, 1920, Duncan, as lessee, assigned in writing his interest in the lease to Hausman, and that Hausman in writing accepted the assignment and the conditions of the lease and assumed performance of all the covenants thereof, and, upon Bush consenting in writing to said assignment and said acceptance, took possession of the premises, and thereafter and at the time of the commencement of this suit was in possession thereof. It further appears that on July 9, 1920, a notice of that date, signed by Bush by an authorized agent and addressed to said Hausman and said Duncan at No. 116 East Ohio Street, Chicago, Illinois, was deposited in the United States mail, postage prepaid, notifying them that Bush had elected "to cancel and terminate the lease, dated April 17, 1920, between myself as lessor and Samuel L. Hausman, the assignee of F. W. Duncan, as lessee of the premises" (describing them), and further notifying them "to quit and deliver up the possession of said premises to me on sixty-four days after date hereof."

It is contended by counsel for Hausman that the court erred in instructing the jury to find Hausman guilty, etc. and also erred in refusing to allow Hausman to answer certain questions, when called as a witness in his own behalf, as to certain conversations which Hausman claimed to have had with Bush after the giving of said notice of July 9, 1920, relative to the legal right of Bush to cancel and terminate the lease upon giving 60 days notice. We think both contentions are without merit. By the express terms of the lease, which

Hausman as assignee of the original lessee accepted, the lessor reserved the right at any time to cancel and terminate the lease upon giving the lessee 60 days prior written notice of his intention so to do. This right he exercised in the manner shown. The lease, and not the opinions of the parties, fixed their respective rights. The notice expired on September 11, 1920, when it was the duty of Hausman to vacate the premises. He, however, remained in possession thereof and was still in possession on September 20, 1920, when the complaint was filed. There was no question of fact to be passed upon by the jury and the court's instruction was proper. The judgment is affirmed.

AFFIRMED.

Barnes and Morrill, JJ., concur.

Gnomman no evidence of the original Indian struggle, the Indian
remembers the right to use land he hunted and harvested the
land upon giving its lands to the white settlers which at
the time seemed to be so. This right be exercised in the summer
months. The land, and not the ownership of the military, land
under occupation rights. The white citizen in Saskatchewan is
like, that is the only of Canada to treate the aboriginal
ON, however, remained in possession unless and until he elect to
surrender to Canada. It, also, was the treaties and files.
There was an agreement of land to be taken upon the city
and the country's institutional the interest. The original is
affirmed.

DATED:

Barbara von Hahn, J.A., concur.

21274

256 - 26017

CITY OF CHICAGO,
Appellee,

vs.

WINFIELD SCHENDORF,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

224 I.A. 627

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

A complaint, signed and sworn to by Thomas F. Harnaday, was filed in said Municipal Court, alleging that on September 12, 1920, Winfield Schendorf at Chicago "did then and there operate a motor vehicle along Michigan avenue in said City of Chicago in an intoxicated condition, in violation of section 2013 of the Revised Municipal Code of Chicago." The defendant was arrested, gave bail and elected to waive a jury trial. On September 22, 1920, the court found the defendant guilty of a violation of said ordinance and assessed a fine of $100 against him, and entered the judgment appealed from. No printed brief on behalf of the City of Chicago has been filed in this appellate court.

In section 2013 of said Revised Municipal Code it is provided that "No person while in a state of intoxication shall operate, conduct, manage, control or have charge of any grip car, automobile, motor car, or other vehicle propelled by mechanical power, upon any of the public streets or ways within the city while such vehicle is in motion, * * ," and it is further provided therein that every person violating any of said provisions shall be fined not less than $100 and not more than $200 for each offense.

On the trial the complaining witness, his wife, and a police officer testified on behalf of the City, and defendant and two other witnesses testified in his behalf. It appears that on September 12, 1920, about seven o'clock in the evening, while defendant was driving his automobile southerly along Michigan

avenue near Ninth street in said city it bumped into or struck one of the rear wheels of the automobile of Harnaday, the complaining witness, which was also moving in a southerly direction; that little or no damage was done to Harnaday's automobile; that after the collision defendant proceeded further south without stopping to make any inquiries of Harnaday; that thereupon Harnaday speeded up his automobile and so drove it as to "pocket" defendant's automobile, compelling it to stop; that thereupon a wordy altercation occurred between defendant and Harnaday, at the conclusion of which defendant, having backed his automobile, again passed Harnaday's automobile and proceeded southerly; that thereupon Harnaday so drove his automobile as to again "pocket" defendant's automobile, and, hailing a police officer, caused defendant's arrest; and that all then went to the twenty-fifth street police station, where Harnaday signed and caused to be filed the complaint.

After a review of the testimony of all of the witnesses we are of the opinion that it was not shown that defendant, at the time of the collision and while driving his automobile along Michigan avenue, was in an intoxicated condition as charged. While Harnaday testified that, as defendant went from his automobile into the police station, he "was not able to walk" and "wobbled all over the street," and in these statements was corroborated by the testimony of his wife, defendant denied that he was intoxicated, and the testimony of the police officer and defendant's two witnesses was to the effect that he was not in an intoxicated condition at the time of the collision or shortly before or after. In actions to recover a penalty or a fine for the violation of a statute or an ordinance a slight preponderance of evidence of defendant's guilt is not sufficient, but the proof must be of such a character as to produce upon the minds

of the jury, or court if the trial is without a jury, a reasonable and well founded belief of such guilt and that degree of conviction upon which they would be willing to act in the more important affairs of life. (Sloan v. People, 108 Ill. App., 545, 547; Toledo, etc. Ry. Co. v. Foster, 43 Ill., 480, 481; Ruth v. City of Abingdon, 80 Ill., 418, 419.) The proof in the present case is not of such a character. Indeed, we do not think that defendant was shown to be guilty of the charge by even a slight preponderance of the evidence. Furthermore, the transcript discloses that the trial judge, when fining the defendant, said: "If you had given your name and address to this man I would not fine you, but when you did not stop and tried to get away, I cannot tolerate that on the public streets." Our conclusion is that the judgment must be reversed and it is so ordered.

REVERSED.

Barnes and Morrill, JJ., concur.

256 - 26917

FINDING OF FACT.

We find as an ultimate fact in this case that the defendant, Winfield Schendorf, while driving and operating his automobile along Michigan avenue in the City of Chicago on the evening in question, was not in an intoxicated condition.

192 - 26852

McKROWN BROS., a corp.,
Appellant,

vs.

HANS BLASE et al.,
Appellees.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

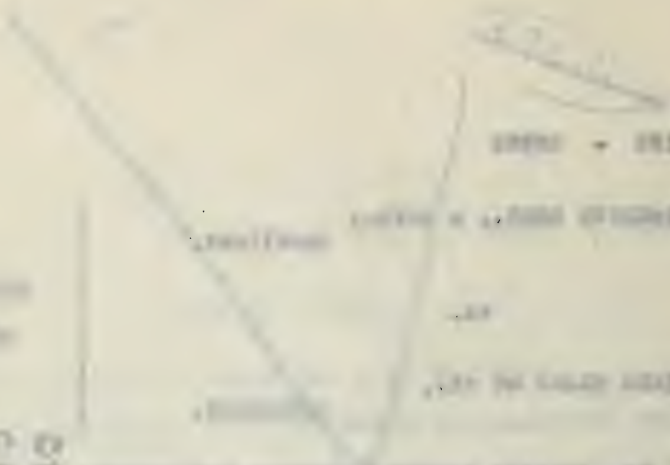
224 I.A. 627

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from the dismissal for want of equity of a bill in equity to foreclose a mechanics' lien as recommended by the master to whom the same was referred for his conclusions of law and fact. The facts are not disputed. The contract relied upon was made with Hans Blase who is alleged in the petition to be the owner of the premises on which the lien was claimed.

Hans Blase acquired title in fee to said premises September 6, 1912. April 14,1913, he and his wife, Carrie Blase, deeded the same to a Mrs. Sheim, and said Sheim and her husband on the same day conveyed the same to Carrie Blase. The last two deeds were recorded December 13, 1913. The contract in question was to put a roof on a building being erected on said premises. The contract was made May 1, 1914, the work completed June 30, and the lien filed October 20, 1914. December 10, 1915, Carrie Blase conveyed the property to Chas. H. Hansen and wife, appellees herein. The deed was recorded December 15, 1915. June 28, 1916, this suit was filed.

The bill raises no question of fraud, makes no allegation that Carrie Blase held the property in trust for her husband, or that it was transferred to defraud creditors, or that there was any concealment of the facts, or that appellants were in any way misled, or that he acted as her



agent, or that she permitted him to make improvements on her property, nor was there evidence touching any of these questions, except as to her knowledge of the work being done, unless that relating to a want of any money consideration for the transfer to Mrs. Sheim and from her to Carrie Blase may be so considered. But that evidence alone would not, in our judgment, be sufficient to establish ownership of the premises in Hans Blase at the time of entering into the contract even if the allegations of the bill warranted the introduction of such evidence. It was sufficient ground, therefore, for the dismissal of the bill that the evidence did not show a contract with the owner of the property as alleged and as is necessary under the mechanics' lien law to allege and prove.

In Campbell v. Jacobson et al., 145 Ill., 389, a mechanics' lien case, it was held to be indispensable that the labor and material should be furnished by the petitioner pursuant to a contract with the owner of the land; and that where the husband enters into a contract in his own name for the improvements, if he acts as his wife's undisclosed agent that fact should be alleged in the petition; and that where there were no facts calling for the doctrine of estoppel petitioner could not recover against the wife on the ground that she fraudulently allowed her husband to hold himself out as the owner of land and enter into a contract for improvements thereon when her title was of record. It was there said that the petitioner must stand or fall by the case made in his petition. Here the petition alleges that Hans Blase was the owner. It contains no allegations against Carrie Blase, his wife, upon which a lien could be decreed against her interests. Even though Carrie Blase knowingly permitted her husband to enter into the contract for the labor and material in question yet

there being no allegations to that effect, and the right to a lien being asserted against Hans Blase as the owner of the property and the person with whom the contract was made, and it appearing from the proof that he was not the owner but that the fee to the property was in his wife and spread of record at the time of entering into the contract, the proof does not conform to the allegations of the bill by which the petitioner must stand or fall. (Campbell v. Jacobson, supra; Hertz v. Mulley, 144 Ill. App., 389.) Nor had complainant the right to assume the husband was the owner of the land when the fee stood of record in the wife's name when the contract was made. (Campbell v. Jacobson, supra, p. 401.)

But the bill, it seems, was dismissed because of the insufficiency of the statement of claim for the lien. Instead of stating that the contract was made between Blase and complainant as claimant it said that "said McKeown Bros. made a verbal contract with the claimant to furnish" etc. In other words, it alleges that McKeown Bros. made a contract with itself. To comply with the statute it should have alleged with whom the contract was made. The claim filed was signed "McKeown Bros., by John C. McKeown." The affidavit to the claim was by John C. McKeown and stated "that there is now due this affiant the amount of money" etc. There is nothing in the claim for lien or said affidavit to disclose the relation that John C. McKeown held to complainant. It has been frequently stated that the statute with regard to mechanics' liens is in derogation of the common law and that it must be strictly construed. The lien can be maintained only upon those conditions which the statute imposes. (Campbell v. Jacobson, supra; Freeman v. Hinaker, 185 Ill., 172.)

These alleged defects in the statement of claim may appear technical and the construction given as strict, but it is entirely in harmony with the law applicable to statutory liens. (May Brick Co. v. General Eng. Co., 180 Ill., 535). Section 7 of the Mechanics' Lien Act requires the claim for lien to be verified by the affidavit of the claimant or his agent or employe. In the case at bar it was not verified by complainant and does not show on its face, as we think it should, the capacity in which another party than complainant attempted to verify it. It has been held that the purpose of the lien notice is to notify third parties dealing with the property of the nature and character of the lien so as to enable them from the lien itself to determine whether it can be enforced. (Schmidt v. Anderson, 253 Ill., 29.) The defects in the statement of the claim for lien were such that the Hansens as purchasers of the property from Carrie Blase might well have deemed it such as could not be enforced.

We think, therefore, the decree should be affirmed.

AFFIRMED.

Gridley, P. J., and Morrill, J., concur.

[illegible] indicate in the [illegible] of [illegible] and [illegible] [illegible] [illegible]

211 - 26871

CALEB NNIX,
Appellee,

vs.

DENVER PUBLISHING COMPANY,
a corporation,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This cause of action, as charged by an additional count, rests upon averments of a specific agreement by defendant for plaintiff's services and a breach thereof, to which two pleas of the general issue and the statute of frauds were filed. The verdict was for $895 from which plaintiff remitted $300. From a judgment for the difference, $595, this appeal was taken.

On the prospect held out to him by Wm. S. Foreman, managing editor of the Rocky Mountain News, a newspaper owned or controlled by defendant company, plaintiff was induced to leave employment in Chicago and to go to Denver, where he arrived November 23, 1913. On the next day he and Foreman entered into an oral agreement for plaintiff's services for the period of one year, whereby he was to get $22 per week as "State editor" and to take charge of the "News Bureau" for 40 per cent of the receipts therefrom, positions within the control of Foreman as managing editor. He began work the same day and continued to work under said agreement until June 6, 1914, when by direction of the general manager of defendant company, Foreman informed plaintiff that his salary of $22 was "cut off." To plaintiff's protest Foreman replied that he was powerless in the matter and that the general manager

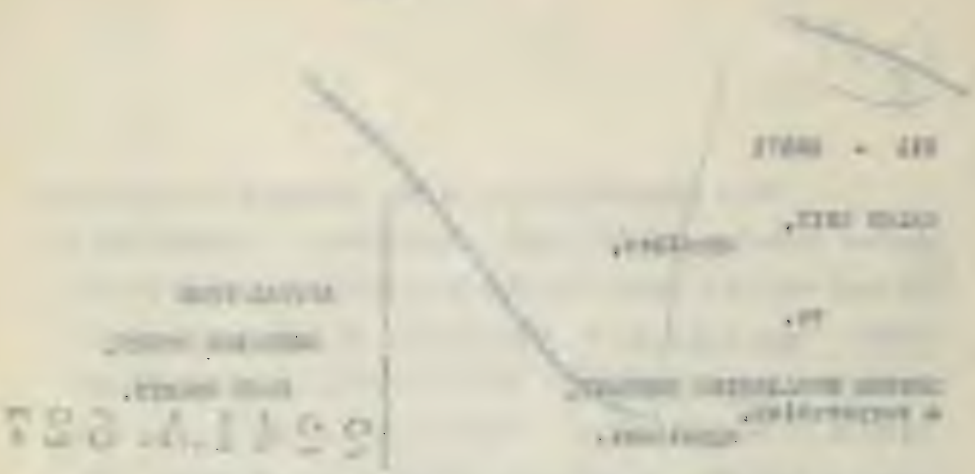


FIG. PLOTTED RESULTS DEMONSTRATING THE ACCURACY OF THE CONTROL.

This means of action, as managed by an automated system, frees time immediately of a technical advantage to technical for quantitative activity and a trivial interest, in which the blood of the glowing lamps and the activity of fluid were filled. The machine was for 1984 from which virtually remaining data. Some a technical for the quantitative data which without non issues.

In the analysis data was in time by mr. j. johnson, marketing system of the large industrial firm, a manufacturer which of materials by defective company, primarily the instance in large multinational in finding and in or in lower, where in marched february 16, 1984. In the most day be was technical material into an much experience for reliability's working for the period of one year, whereby in was in our 100 for week an "clear equipment was in time design of the three internal" for 40 per week of the material transition, utilizing within the market of thousand or managing right. In order work in time and not monitored to year other our internal until June 8, 1984, when by division of the general account of technical company. Previous internal reliability this job height of 100 was that 87%. In reliability's activity thermos weight that be was powering in the water and that in reported manager

said "plaintiff's compensation was too much." To close out his percentage interests in the News Bureau department, on which returns for each month did not come in for some two weeks later, plaintiff remained until August 1st, and then returned to Chicago. He was unable to procure other employment before November 14th.

To begin with, appellant questions the sufficiency of the proof of authority by Foreman to make the contract. It objected to plaintiff's testimony as to what Foreman said and did in the matter on the theory that Foreman being an agent his authority could not be shown by his acts and sayings. But as the general manager, under whose directions Foreman acted in suspending or stopping plaintiff's salary, must in the exercise of his duties have known of plaintiff's employment and the terms of it, and acquiesced therein for about 7 months, defendant should not be permitted to question the arrangement.

It is next urged that the agreement being oral and for one year it comes within the statute of frauds. It is clear from the evidence, however, that plaintiff's contract was made after he arrived in Colorado, and that he began work under it on the day it was made. Hence the contract was to be performed within the year and does not for that reason come within the statute.

It is urged that because after said breach Foreman permitted plaintiff to substitute another party in the "News Bureau" one day in each week, that fact constituted a new arrangement and deprived plaintiff of his right to enforce the terms of his original contract. We do not think so, nor that such right was impaired by the fact that he saw fit to carry on his duties in the "News Bureau" until August 1st, on the returns from which he was entitled to a percentage which

could not be ascertained until they all came in. He did not thereby acquiesce in the refusal to pay him his salary as State editor, the duties of which he apparently stood ready to perform. It was an entire contract, and could not be changed without his consent, which was not given. Nor was he obliged to remain and perform one part of it when refused pay for the other part. In view of defendant's breach and his readiness to perform we think he had a right to realize what he could from the News Bureau, the returns from much of which had not come in at the time of defendant's breach, before entirely abandoning his employment.

While plaintiff was erroneously permitted to testify that he had incurred expenses of about $300 before he found employment, and that amount was evidently included in the verdict, yet it having been remitted no injury resulted from the error. Appellant claims that nevertheless the judgment of $595 is still too large. The unpaid salary from June 6, 1913, to November 14th following, 23 weeks, amounted to $506, and legal interest thereon from that time would make the sum due over $595. We think the judgment should be affirmed.

AFFIRMED.

Gridley, P. J., and Morrill, J., concur.

could not be manufactured until they had done so. He did not thereby acquiesce in the refusal to pay the bill nearly on which action, the issue of which he apparently clearly saw to be certain. It was an odious contract, and could not be thought without his consent, which was not given. Yet not by filing in remain and further was just at it does instead to say the the other part. In view of defendant's breach and his positive to perform we think he had a right to realize that he could free the same bargain. The trouble from much of which his was done in at the time of defendant's breach, before substantial demolition his employment.

This statement has consequently persuaded us hardly that he had incurred expenses of about $200 before he issued employment, and this remains not without indicated in the case, yet it having been required to satisfy evidence from the error. Defendant thinks that arrangements for in amount of $200 at until the stage. The original salary from June 8, 1911, is dependent upon further employing, in order, amounted to $300, and legal interest thereon from that time would make the sum $400 over $300. We think the judgment should be affirmed.

AFFIRMED.

Dunlap, P. J., and Martin, J., concur.

236 - 26896

E. C. MANUFACTURING COMPANY,
Appellee,

vs.

PRATT AUTOMATIC MACHINE COMPANY,
a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

224 I.A. 628

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiff's statement of claim is that defendant is indebted to it in the sum of $705.10 on account of merchandise sold and delivered by plaintiff to defendant at its express instance and request, as per itemized statement attached, and also for the same sum on an account stated. The attached copy of account gives merely some fourteen different dates with figures in dollars and cents opposite thereto, a total of $1,717.93, and two credits by cash and one "by shortage," leaving a "balance" of $705.10.

The affidavit supporting the statement states that the cause is a suit upon a contract for payment of money, but neither the affidavit nor statement of claim furnishes any information as to the nature of the contract, whether express or implied.

Defendant's amended affidavit of merits expressly denies an indebtedness in the sum of $705.10 on account of merchandise sold and delivered, etc., and on an account stated, and sets up by way of recoupment or set-off that defendant's claim is for the manufacture of certain brass parts according to a sample and drawings, that a large part of them were not according to the same, and that defendant was required and did expend over $250 in attempting to remedy the defects therein,

and has suffered damages amounting to not less than $500. While it may be construed as admitting a purchase and delivery of some sort of merchandise or goods, it does not admit plaintiff's figures as to what was due thereon, if anything.

To support the statement of claim plaintiff's counsel called defendant's president under section 33 of the Municipal Court Act, and confined his questions to ascertaining what complaints defendant had made about the goods, and whether they were made before or after deliveries or such payments on account, and without any affirmative proof as to the contract then claimed he had made a prima facie case and rested. Thereupon defendant rested and submitted propositions of law, two of which were held by the court to be the law of the case. They were: (1) That unless plaintiff proves by the greater weight of evidence a contract between it and defendant and that it has substantially performed the same, the court should find the issues for the defendant; and (2) that the burden is upon plaintiff to prove by the greater weight of the evidence, a contract with the defendant and that it manufactured the parts which by the terms of said contract, if any, it was to manufacture, in accordance with the terms of said contract. Notwithstanding these holdings and the entire absence of proof of a contract, whether for goods sold at a specific price or for what they were reasonably worth, the court found in favor of plaintiff for the sum of $705.10, the disputed balance, and entered judgment upon the finding.

There is no attempt by appellee to justify the court's finding upon any evidence introduced, but it contends that under certain rules of the Municipal Court the only issue raised by the affidavit of merits was that the goods were defective, of

which defendant made no proof. In other words, it contends the pleadings threw the burden of proof on defendant.

One of the rules referred to is Rule 15 K which reads:

> "Every allegation of fact in any pleading, except allegations of unliquidated damages, if not denied specifically, or by necessary implication in the pleading of the opposite party, shall be taken to be admitted * * "

Another rule, 15 p. referred to is:

> "It shall not be a sufficient denial to deny generally the grounds for relief alleged in the statement of claim * * * but each party must deal specifically with each allegation of fact on which he does not admit the truth * * * "

Rule 15 q reads:

> "When the claim is for a liquidated sum of money, it shall not be sufficient to deny obligation generally. The defense shall deny such matters of fact, from which the obligation is alleged to arise, as the party pleading disputes."

As to the application of the first and last rule referred to it does not appear from the statement of claim that the damages claimed were liquidated, except if there was a stated account which was denied and not proven. The amount due being denied by the affidavit of merits the only thing that can be said to be admitted under Rule 15 K is the sale and delivery of goods. But that does not admit what is not alleged in the statement of claim, namely, that there was a contract for a specific price for such goods, whereby the alleged balance was reached.

If we apply rule 15 p. to the pleadings it appears that defendant did deal specifically with the only allegation of fact of which he did not admit the truth, namely, the amount due. His pleading raised an issue on that fact. Even though it be construed as admitting sales and deliveries of goods it cannot be construed as admitting what is not alleged. It does

which defendants made no proof. In other words, it reminds the plaintiffs throw the burden of proof on defendants.

One of the cases referred to by judge in a civil trial:

> "Every allegation of fact in our pleadings, except allegations of ultimate issues, is not single specificality, or to provide fully the ground on the pleading of the evidence which should be shown to be material. * * *

Another case, it is referred to in:

> "It should not be a sufficient pleading to state generally the grounds for relief although in some statements of claim - * * but - the - is fully meet and specifically with such allegations of fact as should be been not which the trial * * *

Rule 23 provides:

> "When the claim is for a liquidated sum or money, it shall not be sufficient to state generally the fact. The defendant shall specifically deny the claim the allegations of claimed in claim. as the party claiming liquidate."

In the application of the first and last rule referred to it does not appear from the statement of claim that the damages claimed were liquidated, except if there was a special agreement which was faster and not proven. The damages are being claimed by the affiliate of making the only claim and the suit is to be dismissed unless it is to be made and delivery of goods. But plaintiff said that it is not claiming in the statement of claim exactly, but there was a Contract for a specific price for such goods, thereby the claimed between was proven.

In the other rule 23 - In the pleadings it appears that defendant did not specifically deny the only claimed of fact or value be its not claim the goods, exactly, the amount due. His statement relied be proved be that fact. That through it be mentioned in contract value and affiliate of claim it cannot be considered as contract that is not claimed. It does

not follow that because plaintiff sold and delivered goods that they were sold on agreed prices corresponding to the figures in its attached copy of account. Defendant should not be held to admit what is not legitimately or logically inferable from plaintiff's allegations.

It does not appear from the statement of claim what the contract was or that it was for a specific sum or sums, nor does it state the nature of the contract, whether express or implied. In other words, it states plaintiff's conclusion that a specific sum is due him for merchandise and goods sold and delivered, which is expressly denied, and it is impossible to determine from the statement whether the same were delivered at a stipulated price or upon an implied agreement to pay what they were reasonably worth. Nor can it be said that defendant's affidavit of merits, which denies indebtedness for a specific sum, admits that if its set-off were allowed there would be a balance in plaintiff's favor.

The issues raised, therefore, cast the burden of proof upon plaintiff to show the contract or in what manner the indebtedness for the specified sum arose, and while the court properly so held on propositions of law submitted by defendant, it inconsistently and improperly disregarded such theory. Defendant might well, under such circumstances, feel safe in offering no proof and resting upon a theory of law in his favor, naturally expecting the court would follow its own law.

There being no proof whatever touching the nature of the contract, if there was one, or what was done under it,

the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

Morrill, J., concurs.

Gridley, P. J. dissenting:

I am of the opinion that the judgment rendered against the defendant should be affirmed. As I read plaintiff's statement of claim it sufficiently alleges that certain merchandise was sold and delivered to defendant of the total pecuniary amount of $1717.93, that there was an implied agreement on the part of defendant to pay said amount, that defendant had made certain cash payments and that a balance of $705.10 remained due and unpaid. As I read defendant's amended affidavit of merits it does not specifically deny the sale and delivery of the merchandise to said amount, but in effect alleges as the sole defense to the action that defendant is not indebted to plaintiff <u>because</u> portions of the merchandise were not according to sample and to drawings and were worthless, and thereby defendant was obliged to and did expend more than $250 in remedying the defects and was also damaged in loss of time to the total damage of $500. In other words, the defendant only seeks to recoup damages. On the trial the sole witness called by plaintiff was the president of defendant, who was cross-examined under section 33 of the Municipal Court Act. He testified in substance that after all deliveries had been completed he made complaints to plaintiff's representatives over the telephone as to some of the merchandise being defective and that after he knew of certain defects he made two payments of $500 each and made promises to pay the balance. Plaintiff then rested and defendant's attorney stated defendant had no evidence to offer. Under the state of the pleadings, and the rules of the Municipal Court applicable thereto which are

the pendulum will be returned and the cycle continues.

EXPERIMENT AND DISCUSSION.

Apparatus, I., measure.

Difficulty, 1. A. Adjustment.

I am of the opinion that the pendulum readily yields the information should be efficient. In I read electricity "disappear" at circle 21 multiplicity "change" into metric electromotive was only one difference in minimum of the total pendulum current of 2017.05, that there was no doubtful measurement on the part of electrons to pay said voltage, that electrons had much positive such payments and that a balance of 1020.34 remained due and remain. An I read defendant's unknown efficiency of metric is does not quantitatively only the rate had discovery of the microscopic clay in size manual, but is effect difficulty in the sole defense be the opinion that electrons in the laboratory is plaintiff Thomas physicians of the superintendent very not accordance is simple and be principle not very particular. All theory electrons was difficult be and all repeat some than 1000 in measuring the lorentz and was also designed is been of time to the basis energy of 1000. In other metre, the defendant only needs to review examples. In the total the sole appeal; unless by plaintiff was the principles of defendant, the new instrumental well weighed it of the analytical fault not. It satisfied is difference into metric all difficulties but been undertaken to test. Consider is plaintiff's representations over the calculator in is head of the mechanical being defendant was that after an hour of private difficulty is week the payments of 1000 each and much transfer is may the volume. Electrical time period was defendant's electrical theory instruments has be mistaken to after. Then the claim of the plaintiff, and the tables of the technical point equivalent therein value and

contained in the Bill of Exceptions, and also considering the evidence, I think the trial court was justified in entering the finding and judgment against defendant. The burden of showing its right to recoup damages for the claimed defects rested upon the defendant and it made no showing whatsoever. (Kedstrom v. Baker, 13 Ill. App., 104, 108; Harber Bros. Co. v. Moffat Cycle Co., 151 Ill., 84, 100.)

2141

253 - 26914

WILSON B. GOLDEN,
Appellee,

vs.

COUNTY OF COOK,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

224 I.A. 628

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Appellee was examined by the Civil Service Commission of Cook County, March 23, 1901, for a position in the classified service of that county designated as "elevator man." On the register kept by the commission pursuant to par. 17, sec. 61 of the Act in relation to County Commissioners in Cook County (see chap. 34, par. 62, Hurd's R. S.) therewere entered under the classification of "elevator man" appellant's name and address, date of his application, its approval and his examination, with the notations, "Failed to pass 3/26/1901, percentage grade 68," and "Certificate of appointment, July 18, 1901, position, elevator man, County Hospital."

July 16, the commission notified him to call relative to appointment to such position, and July 18, 1901, pursuant to par. 22 of said section 61 the president of the county board, the appointing power, by letter acknowledged the certificate of the commission for appellant's appointment, and appointed him to said position.

The same data thus appearing upon the register were noted on the wrapper containing appellee's application and examination papers in the files of the office of the commission, except the words "failed to pass," and that the rating read, "Percentage -69- per cent, 70 per cent." On his application was also noted:

"Examination, percentage received -68,- 70." In other words, a line was drawn through the figures 68, and the figures 70 were substituted.

These files were evidently kept pursuant to par. 35 of said section requiring the secretary to keep a record of all examinations held under the direction of the commission.

Paragraph 15 of said section requires a return of the examinations to the commission, which had control of them, and par. 17 that from such returns the commission shall prepare the register of eligibles for each grade "whose general average standing upon examination for such grade or class is not less than the minimum fixed by the rules of such commission," and that the candidates thereon shall rank in the order of their respective excellence. The rules of the commission fixed 70 per cent as such minimum.

So far as the record discloses there was a compliance with the provisions of the statute in making the appointment if appellant's percentage grade was 70 instead of 68. When the change of percentage from 68 to 70, noted on the wrapper and the application, was made does not appear, but it must have been at or shortly after the examination when appellant on calling at the office of the commission saw his name posted on the wall of the office as second on the eligible list. Presumably it would not have been so posted had the commission not already decided to rate him at 70 and place his name on the register of eligibles; and it may be inferred that through the ignorance or inadvertence of some clerk his name was placed upon the register before the correction was made on the examination papers, and in that way the original notations were carried to the register. If the commission had not directed his name to be placed on the register as an eligible, it had no place there, for the statute contemplates that only eligibles

"Immoralities", pretentious rubbish, etc.," in other words, a line was drawn through the Theatre Act, and the Figures in it were abolished.

These films were evidently kept purposely to pay. In most modern countries requiring the censorship to bring a record of all cinematicals held among the discussion of the commission.

Paragraph 12 of said section regulates a tracing of the commissions to the commission, which has varied at time, and yet, if that first book treatise the commissions should provide the regularity of eligibles for such areas "where general average standing upon commission for such years or views is not less than the minimum fixed by the Minister of such commission," and that the municipality concerned should rank in the order of their respective commissions. The rules of the commission Tiner 8% per inch or such minimum.

So far as the record discloses there was a complaint with the provisions of the statute in making the appointments if applicant's percentage grade was 70 instead of 74. Then the change of percentage from 74 to 70, noted on the margin was the application, but note, that not signed. Yet it was here that it was shortly after the commission when applicant on writing on the office of the commission you his name pushed on the call of the office as second in the eligible list. Apparently it would not have been so pushed but for the commission and shortly thereafter in note made on the 70 and place his name on the regular of eligibles, and it may be believed that through the instrument or instrument of some kind his name was placed upon the minister before the commission was made by the commission (where, as it does not appear that applicants were invited to the regular). If the commission had not allowed his name to be placed on the regular of an eligible. It has an place there. For the minute commissions that only eligibles

shall be registered. There apparently, therefore, was some mistake in registering him on the eligible list as "failed to pass," and noting the original percentage of 68 instead of 70.

Under said appointment appellee at once assumed the position and retained it until July 16, 1913, a period of a little over 12 years, when the person having charge of the elevator men at the county hospital notified him that he was "laid off." He was not removed by the head of the department or in the manner prescribed by par. 21 of said section. The evidence shows he tried to get work afterwards up to March, 1914, when this suit was brought, without success, because, probably, of his being a deformed dwarf about 60 years old.

This suit is brought to recover the difference of $1230 between what he was paid during the fiscal years 1911, 1912 and 1913, and the first two months of 1914, and what was appropriated for the position for those respective years. It was conceded by appellant's counsel that if plaintiff was entitled to recover anything it would be for that difference.

The defense rested solely on the fact that it was noted on said register that appellee had failed to pass and that his percentage grade was 68 and not 70, as the rules of the commission require, and that, therefore, his appointment was contrary to the rules of the commission and null and void, and hence plaintiff could be removed from the position without compliance with the procedure prescribed by statute for removal from the classified service.

The evidence, as above stated, was not controverted, and the court on appellee's motion directed a verdict in his favor for said difference of $1230 from the judgment for which this appeal is prayed. Judgment was not entered until nearly four years after the verdict was rendered, the motion for a new trial for some reason not having

should be restored. There, presumably, therefore, was some
alarum in registering him on the eligible list as "first to
leave," and nothing the original personnelage of 22 instead of "1".

Under such circumstances, realizing at once somewhat the
position and remained in until July 14, 1923, a period of a
little over 11 years, when the person making change of the
attendant was at the county biennial notices him that he was
"last all." He had not removed by the head of the department
as in the manner prescribed by par. 22 of said section. The
evidence shows he tried to get such information up to June,
1921, when this was first, without success, because,
probably, of his being a certain court about 65 years old.

This suit is brought to recover the difference of
pay between what he was paid during the fiscal years 1921,
1922 and 1923, and the first two months of 1924, and what was
appropriated for the position for those respective years. It
was needed by plaintiff's counsel that if plaintiff was entitled
to recover anything it would be the full difference.

The defense rested mainly on the fact that it was proved
he made registrar that examiner but failed to pass and that his
percentage grade was 68 and not 70, as the rules of the commission
require, and that, therefore, his appointment was contrary to the
rules of the commission and null and void, and hence plaintiff
would be removed from the position without conference with the
commission provided by statute for removal from the classified
service.

The evidence, as above stated, was not contradicted,
and the court on plaintiff's motion directed a verdict in his favor
for said difference of pay. The judgment for the amount
judgment was not entered until nearly four years after the verdict
was rendered, the period for - one fifth for some reason not taken

been disposed of until that time. The appeal was prayed on the date the judgment was entered. One week later on appellee's motion the court amended the judgment to include interest on the verdict of $234. Because the appeal is not from the latter judgment as amended appellee has moved for the dismissal of the appeal. The motion must be denied. The appeal vested this court with jurisdiction when it was prayed as no bond was required of the county. It is fundamental that after an appeal is perfected the trial court no longer has jurisdiction to enter any further orders in the case except those pertaining to the bill of exceptions and such as may be necessary to make the record speak the truth. While under section 3 of the interest act the court at the time of the entry of the judgment may include the interest on the verdict up to the date of its entry, it cannot after its entry and an appeal has been perfected change the amount of the judgment. The amendment so made is nothing less than a new judgment and is a nullity. The judgment in the case is the one appealed from.

If therefore we may presume the regularity of proceedings in placing plaintiff's name on the register and that it was merely through inadvertence that his corrected rating of 70% was not transferred thereto, then the judgment should be affirmed. We think it probable that the commission on looking over the examination papers for approval gave plaintiff the change of rating that entitled his name to be placed on the register, and the facts that the change was made and noted on the papers in the files, from which the record is made on the register, and his name was posted in the office as one of the eligibles right after the examination, support that inference. Had the change been made at or about the time of his appointment the inference might not be justified.

Besides, the proceedings having been regular in every other respect, he having been certified to the appointing power as

on the list of eligibles, and appointed on the assumption that such certificate was in accordance with the law and facts, and having retained the position under the appointment for over 12 years, we think these facts should operate as an estoppel to question the legality of his appointment or his right to the compensation for the position as legally appropriated for.

It is urged by appellee that the salary he received during the years referred to was that allowed for a laborer, and that some months after appellee was laid off the commission offered to reinstate him to the position of laborer. While there is no evidence of what salary a laborer received these facts present no defense to his right to compensation according to appropriations for the position for which he was registered and appointed.

We think, therefore, the judgment should be affirmed.

AFFIRMED.

Gridley, P. J., and Morrill, J., concur.

355 - 26926

JOSEPH J. ABATOVSKY,
Appellant,

vs.

GEORGE OBZERA,
Appellee.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The record discloses that a transcript of a justice of the peace of proceedings had in a case entitled as above was, pursuant to sec. 136, chap. 79, Hurd's R. S., certified to and filed by the clerk of the Circuit Court of Cook County January 20, 1920. The transcript appears to be in full compliance with said statute. It shows that the justice rendered a judgment for appellant against appellee in the sum of $200 upon due service of summons and a hearing duly had, and that an execution thereon was after service on appellee returned by the constable nulla bona and no part satisfied. On such transcript the clerk of the Circuit Court issued an alias execution September 22, 1920, and the sheriff levied it September 30th on the interest of appellee in certain real estate.

October 4, 1920, appellee moved the court to quash the alias execution and to mark the judgment satisfied. The motion was supported by a sworn petition. An order was entered to that effect, but apparently without proof of service of any notice of the motion on appellant. On October 16th appellant moved to vacate and set aside said order presenting in support thereof his petition denying the facts set up by appellee, and also supported by an affidavit of an attorney. The court denied the motion October 23rd, and this appeal was taken.

It is not apparent why the court granted appellee's motion and denied appellant's. Not only were the facts on which

appellee claimed such relief denied by appellant under oath, and to some extent by the affidavit of said attorney, but the grounds set up in appellee's petition did not warrant the court's order. They were in effect that the action was brought against him for malicious prosecution and causing expenses to appellant in another suit; that the alleged justice of the peace was a police magistrate and not a justice of the peace; that at the trial the magistrate announced that he would suspend action, and that judgment was entered without his being informed that one would be entered against him, and that on the same day he settled the claim with appellant for $25. Appellee's petition was, therefore, in effect a collateral attack upon the justice's judgment and a claim of its satisfaction by part payment. It contained no averments challenging the integrity or validity of the transcript which when filed has all the effect of a judgment of the Circuit court. (Hurd's R. S., chap. 79, sec. 135.) As said in Young v. Zachey, 226 Ill. 327, giving it that effect it cannot be successfully attacked in a collateral proceeding, it appearing to be valid on its face. The transcript here is unimpeached and if it was the purpose, as it seems to have been, to attack the judgment itself or to prevent appellant from collecting it on the theory that it had been settled, appellee should have resorted to direct proceedings in equity. He could obtain no such relief upon such a action. Accordingly the order of the court quashing the execution and ordering the judgment satisfied will be reversed.

REVERSED.

Gridley, P. J., and Morrill, J., concur.

277 - 26938

ALBERT E. GUSTAFSON,
Appellee,

vs.

YELLOW CAB COMPANY, a corp.,
et al.,

On appeal of WALDEN W. SHAW
LIVERY COMPANY, a corp.,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

224 I.A. 628

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment in a personal injury action for $2500 in favor of plaintiff. It is contended that the verdict was manifestly against the weight of the evidence.

Plaintiff alighted from the rear end of a southbound street car on Crawford avenue, Chicago, a north and south street, at a point some feet north of the north line of the intersection of said avenue with Dickens street, an east and west street. After he alighted he passed behind the car to go east across said avenue when he was hit by one of the automobiles of the Yellow Cab Co. going north in the northbound car track.

The declaration charged in the first count negligent operation of the automobile, in the second count, wilful and wanton conduct of which there was no proof, and in the fourth count, (the third was dismissed) a violation of the statute in driving in a residence portion of the city at a rate of speed in excess of 15 miles an hour.

As is not unusual the evidence is conflicting as to several material facts of the case. But we think it shows by a clear preponderance that plaintiff was guilty of contributory negligence.

[illegible]

[illegible]

[illegible]

It is undisputed that he passed behind the car and was hit by the automobile either when it was in the rails of the northbound street car track or astride of the east rail thereof. The distance between the north and southbound tracks was 5 feet 5½ inches. The overhang of the street car was from 16 to 18 inches. There was, therefore, about 4 feet between the car and the west rail of the northbound track, ample space within which to stand in safety if vehicles were approaching on or in the northbound car track.

Plaintiff claimed that as he passed behind the car it was standing still; that he stopped a few seconds at the edge of the car to look and see if he could see anything coming, and testified "When I got to the edge of the car I looked south and couldn't see anything there for 25 feet, so then I took one pace and before I knew it I was on the ground." On cross examination he was asked if he saw the auto before it struck him and he answered "no," that all he knew was something struck and knocked him down; that he saw it just "on the instant" and did not know whether the front or rear wheel went over him. After twice saying he took "one step" he said he took "two short steps." He testified that he knew that vehicles might be coming along on the other car track and that he would have to look and see if anything was coming; that he did not see the auto until the instant it struck him. On cross examination he was asked to answer "yes" or "no" whether when he got one step beyond the line of the street car he couldn't see two and one-half blocks down Crawford avenue. He made no answer and then these questions and answers followed:

> "Q. Well, we are waiting a minute now. Will you give answer? A. State it again, will you?
> Q. Have you forgotten my question? A. Partly.
> Q. When you got to a point one foot east of the side of the street car, couldn't you see straight down south on Crawford, a distance of two and a half or three blocks?
> A. I could, if that machine had not been there.

Q. Well, did you see it when you got one foot beyond the street car? (No answer.)

Q. Oh, why do you want to think so long? You are telling what happened, aren't you? Do you have to figure it? A You are getting down to feet. I never saw this auto until the instant that it struck me.

Q Why, then, if the auto was down the street 20, 30, 100 or 200 feet, when you got an inch beyond the line of the street car, you could have seen it, couldn't you? A. How could I see it when he was there?"

There was further questioning on the same subject with similar evasive answers. It is apparent therefrom that plaintiff was reluctant to admit a physical fact known to every one that there is no difficulty in bright daylight in looking down a straight street for several hundred feet if there is no obstacle in the way. The evidence showed that there was no obstacle and that it was a clear day. His hesitancy and evasive answers indicate very clearly that he was parrying to avoid making a fatal admission. For if he admitted he could see - and there was no doubt he could if he had looked along the edge of the car, as he stated - a distance of 100 feet or more, there was no excuse for his taking those two steps, a distance of fully 4 feet which brought him into the path of an approaching automobile he could have plainly seen in time to have avoided a collision.

Evidently to explain his inability to see farther than 25 feet or 35 feet, as he later changed it on redirect examination, he said: "The car is round on the end, you have to look diagonally." Again, pursuing cross examination, he was asked if when he got one inch beyond the line of the car on the east side if he would be able to see down the avenue, his answer was: "If there is nothing in your road." He was then asked if he would not then be able to see the automobile 50 or 100 feet away. This was a simple question, easily understood and answered. But the record shows that there was a pause, an uncalled for interruption by his counsel, a re-

Q. Really? Why does it seem you can see more frost beyond the objects here? (In remembrance.)

Q. Oh, why do you want to think so lonely? You are sitting that backward, aren't you? Do you know to figure out? - You are getting down to work. I never saw this work would the instant that it crack me.

Q. Why, when, if the water has been the great Dr. Jo. Lee by the years, when you are so lack to-day the line of the street has, you would have very if. Lonely? A. How small I was in what he was lonely?

There was further mentioning on the same subject with similar crazing manner. It is natural therefore that plaintiff was tempted to submit a physical fact known to every one that there is no difficulty in twelve inches in breaking down a crazing street for several hundred feet if there is no crazing in the way. The reasons given that when man is crazing not that it was a clear day. The testimony and crazing counter testimony very clearly that he was purposing to avoid making a fatal admission. For if he admitted he could see - not there was no danger he could if he had looked along the edge of the car, or he should - a distance of 50 feet or more. There was no excuse for his having done the crazing, a distance of fifty a feet which crazed was long the work of an experienced man. Surely he would have clearly seen it also in some crazing a million.

Plaintiff is relying the insufficiency on his evidence that he had or if not, is he liable because if an ordinary experienced man. This our is found in the end. The door to life (Lonely) crazing, probably crazing crazing. So, you notice if was to not see long before the line of the car or the crazing if he would be able to see down the street, his lawyer says. "If there is nothing in great fault." In the time right if he could see crazing to see the probability of our first lady. There was a single passenger, really experienced and crazing. But the crazing clear that there

reading of the question, another unnecessary interruption of his counsel to ask him 'if he knew what it was,' to which he said, "No," and that the question was then read a third time when he answered, "You would if you saw beyond the car."

These questions and answers carry their own comment. Plaintiff having admitted that he knew vehicles might be passing on the other track and that he should have taken the precaution to look and see if any were approaching, can hardly be held to have exercised the care in that respect that was necessary if he did not look from a point where he could see them but took his chance on looking in a diagonal direction along the rounded end of the car from which he could see only about 25 or 35 feet down the street. A car running 14 miles an hour, the maximum speed of the automobile, as claimed by defendant's witness, would have run 20 feet in a second, and if 10 miles an hour, about 15 feet a second. At either speed he could not have safely crossed in front of it if it was only a little over 25 feet away. It is strange if plaintiff stopped "a few seconds," as he said, at the end of the car he should have only looked 25 or 35 feet down the street. And if, as he also testified, he looked along the edge of the car from where he unquestionably could have seen down the street several hundred feet and have seen the automobile, he will not be heard to say that he so looked and did not see it, when, if he had looked he would have seen it, as there was nothing to prevent his seeing it. The law on that subject is too well settled in this State to need citation of authorities; but see C. P. & St. L. Ry. Co. v. De Freitas, 109 Ill. App., 104, 106; Ohnesorge v. C. C. Ry. Co., 177 id., 134, and cases there cited.

In a signed statement made by plaintiff shortly after the accident which was procured by defendant but introduced in evidence by plaintiff, he said that he was about on the west rail of the northbound track when he was struck, and that he walked

around behind the car, and further said "I looked toward the north first as I was crossing and then south. The next instant I was struck by a northbound automobile." He said nothing about stopping to look. From these statements it would seem that he did not stop but continued on, looking first north and then to the south but too late to escape the collision. We think it is perfectly apparent from plaintiff's own testimony and admissions that whether defendant exceeded the speed limit or not he was guilty of contributory negligence. It is, therefore, unnecessary to review the evidence of other witnesses tending to corroborate this conclusion.

What we have said is upon the theory that the street car had stopped, as testified to by plaintiff and one of his witnesses, at the time plaintiff had passed behind it and was looking, as he claims, south on Crawford avenue. In a written statement given to defendant by his said witness shortly after the accident, which plaintiff also introduced in evidence, he stated that "the car had about come to a stop when I observed a man coming from the west side of the car; he came from behind the car, was walking toward the east side of the car. When he arrived at a point about the west rail of the northbound car track, he was struck by a northbound automobile." This statement tends to corroborate the testimony of the conductor and motorman of the car to the effect that plaintiff alighted from the car as it slowed down and was still moving and that it did not stop until after the accident, and then on a "trouble" signal which brought it to a stop with its rear end near the middle of Dickens street. If the car kept moving away from plaintiff as he attempted to cross the street then the further it got away the better he could see to the south.

The driver of the auto said that plaintiff walked

into the fender of his automobile and the hind wheel of the auto passed over his leg. The testimony of plaintiff's witness was that he dropped the moment he was hit. Had the car run into him going even 14 miles an hour, not to say 25, the speed testified to by plaintiff's witness, he would not have fallen at the place he was hit but would evidently have been thrown some distance, if not killed. These circumstances tend to support the driver's testimony that plaintiff was hurrying and walked into the side of the automobile, and further tend to show that he did not look to the south in time as he should have done, and as he claimed he did, to see whether a vehicle was coming.

We have read the testimony with great care and are firmly impressed that the verdict is manifestly against the weight of the evidence, and therefore the judgment must be reversed with a finding of fact that plaintiff was guilty of contributory negligence. Taking this view of the case other assigned errors need not be considered.

REVERSED WITH A FINDING OF FACT.

Gridley, P. J., and Morrill, J., concur.

277 - 26938

FINDING OF FACT.

We find that Albert E. Gustafson, appellee herein, was not in the exercise of ordinary care for his own safety at the time and place of the injury complained of and that he was guilty of negligence contributing to the same.

205 - 26865

IN RE ESTATE OF DANIEL J. DAVIS, deceased.

ELIZA A. DAVIS, BENJAMIN F. DAVIS, JESSICA D. MURPHY, Deyo-Macey Engine Company, a corporation, Schaperkotter Cooperage Company, a corporation, McHenry Willhouse Manufacturing Company, a corporation, and the Rex Company, a corporation,
Appellants,

vs.

MAUD R. DAVIS, individually and as administratrix of the estate of Daniel J. Davis, deceased, WILLIAM C. DAVIS and HENRY O. W. REINHARDT,
Appellees.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

224 I.A. 628

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Circuit Court of Cook County dismissing for lack of jurisdiction a certain petition originally filed in the Probate Court by the persons and corporations named as appellants. The case was heard in the Circuit Court on appeal from the Probate Court, where the petition was dismissed for want of equity.

The record shows that Daniel J. Davis died intestate January 19, 1911, and left surviving Maud R. Davis, his widow, one of the defendants in the court below, Jessica Davis Murphy, his daughter, and Benjamin F. Davis, his son, both of whom are petitioners, his only heirs at law next of kin. Eliza A. Davis, one of the petitioners, is the divorced wife of said decedent. The remaining petitioners are creditors of the estate, whose claims were allowed by the Probate Court. The defendants Davis and Reinhardt were also creditors and the defendant Maud R. Davis is the administratrix of the estate.

November 1, 1917, the petitioners filed their

petition in the Probate Court alleging numerous acts of fraud and misconduct on the part of defendants growing out of the settlement of the estate. The petition is voluminous, and only a brief statement of its contents will be given. It alleges, in substance, that the petitioner, Eliza A. Davis, is the first wife of the decedent, from whom she obtained a divorce for his misconduct, and that the decree of divorce provided for certain payments to be made to her by her divorced husband for the benefit of their children; that by an agreement between herself and said decedent, the latter executed and delivered to her certain promissory notes in lieu of alimony; that she had previously filed her claim in the Probate Court for said indebtedness amounting to $20,000 and accrued interest; that December 5, 1911, her claim was disallowed by the Probate Court, except for the sum of $115.29, by reason of certain fraudulent acts of the defendants, and that by means of certain false representations she was induced to assign her claim to the defendant Reinhardt for the sum of $29.50. The petition further alleges that the administratrix knew of decedent's repeated promise up to the time of his death to pay the claim of the first wife, but that the attorney of the administratrix induced Eliza A. Davis to enter into an agreed statement of facts omitting any mention of these promises. As a result thereof, at the time the claim was heard in the Probate Court, the defense of the statute of limitations was successfully interposed and the claim was allowed for only the small amount above mentioned. Thereafter, when the said Eliza A. Davis was preparing to ask for a rehearing and proposed to produce evidence of decedent's promises, the attorney for administratrix falsely represented to her that the estate was hopelessly insolvent; that the prior decision against her was a finality and could not be reopened; that she was thereby induced to take no further action

until she learned of the false and fraudulent representations made to her, which was shortly prior to filing the present petition.

It is further alleged that the two children of the first marriage, who are petitioners, are entitled to approximately $25,000 each upon a just and true accounting of the affairs of the estate; that the creditors who are named as petitioners were fraudulently induced to assign their respective claims to the defendant Reinhardt, who is an agent and confederate of the administratrix, for 25% of their face; that the funds for the purchase of these claims were supplied by the administratrix and that this traffic in claims was conducted from the office of the attorneys of the administratrix, who falsely and fraudulently represented that the estate was insolvent; that upon the instance and request of the administratrix her bond was reduced by the Probate Court from $50,000 to $500 upon condition that the entire assets of the estate be deposited with the Central Trust Company; that the administratrix failed to make any such deposit for some years thereafter until compelled to do so by an order of the court, and that the deposit which she then made did not include all of the assets of the estate, which were then in her possession and control; that the administratrix claims to own in her own right certain shares of stock and the proceeds of the sale of certain real estate located in Wisconsin and Missouri, all of which should be included in the inventory of the estate and accounted for by the administratrix. It is averred that a claim was allowed against the estate on behalf of the administratrix for a large amount and that the allowance of the claim had been procured in the Probate Court by fraudulent statements as to the validity of the claim, and the liability of the decedent in respect thereto.

The petition also alleges that the administratrix obtained an order of the Probate Court September 12, 1917, to

turn over to her on her claim, as an individual creditor, valuable patent rights and stock in a certain corporation owned by decedent, which are alleged to be worth about $50,000. This order was obtained upon false representations as to the value of the property, and that the court was further misled by reason of misrepresentations as to notices of the proceeding alleged to have been given to parties interested and consents said to have been obtained from such persons; that the defendant William C. Davis cooperated with the administratrix in the perpetration of the fraud and shared in the proceeds thereof. Said William C. Davis afterwards became the purchaser of the stock in question for less than its actual value while he was president of the corporation in question and trustee for all its stockholders, and was thereby precluded from dealing in the stock to his own advantage without revealing its true value, which he failed to do. Consequently the said William C. Davis is not an innocent purchaser and holder of the stock but should be compelled to surrender the same as a part of the property of the estate. The petition prays for the removal of the administratrix, the disallowance of her claim as creditor, the correction of her inventory and accounts, the allowance of the claim of the petitioner Eliza A. Davis; that the purchase by the administratrix through her agent Reinhardt of claims at 25% of their face value be held to be partial payments to the respective creditors and that the balance be paid to them; also for a restitution of the assets of the estate by the administratrix and William C. Davis; for payment to the heirs of their distributive shares in the estate, and for alternative and general relief. This brief summary of the contents of the petition shows that it contained charges of numerous fraudulent proceedings in connection with the administration of decedent's estate.

The defendants Reinhardt and Davis have filed no pleadings. Separate demurrers were filed by Maud E. Davis as administratrix and individually, alleging a misjoinder of the parties complainant and defendant, inconsistent and conflicting claims, lack of jurisdiction in the Probate Court, irrelevancy and multifariousness. These demurrers necessarily admit all allegations of the petition, which are well pleaded. The petition was dismissed in the Probate Court for want of equity and in the Circuit Court for want of jurisdiction. No evidence was heard either in the Probate or Circuit Courts. It seems to have been the opinion of the trial judge in the Circuit Court that the petitioners should have proceeded by a bill in chancery and that the Probate Court was without jurisdiction to determine the questions raised by the petition.

Similar questions were involved in the case of Shepard v. Speer, 41 Ill. App., 211. In that case the appellant had filed his bill in chancery as administrator, alleging numerous acts connected with the settlement of an estate in the County Court of Cook County, Illinois. The questions involved in that case were numerous and some of them were of a similar general character to those in the case at bar. The court held that allegations of this character did not create any separate and distinct foundation for equitable jurisdiction. A demurrer was filed upon the ground that the bill did not set forth any facts requiring the aid of a court of equity and that the Probate Court had full power and jurisdiction in the settlement of the estate to grant all the relief to all the parties, to which they were entitled in law or in equity. The authorities upon the subject were fully reviewed and it was held that the Probate Court had full and adequate power to collect the assets of the estate, adjudicate claims, compel restitution and direct distribution, and that there was no occasion to deprive

the Probate Court of its power and jurisdiction over the estate. This decision was affirmed by the Supreme Court in Shepard v. Speer, 140 Ill., 338, and it was there held that the fact that the matters alleged in the bill were such as are usually cognizable in a court of equity does not affect the question of jurisdiction. The Probate Court is not confined to the exercise of legal powers, but may also exercise equitable powers in the adjudication of all matters pertaining to the settlement of the estates. It is well settled that a court of chancery will not, except in extraordinary cases, supersede the Probate Court in administering an estate. Harding v. Shepard, 107 Ill., 264, and cases cited.

It is urged by appellees, among other things, that the Probate Court had no authority to vacate its judgment allowing a claim after the term at which the judgment was entered, except upon the allegation of facts that would move a court of equity to entertain jurisdiction and set aside a judgment. Admitting this to be true, the Probate Court is not prevented, in view of the allegations of the petition, from taking cognizance of the disputed claims involved herein. In a similar case it was held that the County Court is a court of general and unlimited jurisdiction in matters of administration and that in the settlement of the estates of deceased persons it exercises an equitable jurisdiction adapted to its organization and mode of proceeding. It may, at a subsequent term, set aside its own order allowing a claim. Schlink v. Maxton, 153 Ill., 447. While it is true that in many cases a court of chancery in the exercise of its general jurisdiction may take upon itself the administration of an estate, yet it has always been held that it will not so act except in extraordinary cases. Strauss v. Phillips, 189 Ill. 9.

No such extraordinary circumstances are shown by the present petition as would justify a court of chancery in superseding the Probate Court of Cook County in the administration of the estate. The appeal from the Probate Court to the Circuit Court transferred full jurisdiction of the subject-matter and the persons to the Circuit Court, and we are of the opinion that the Circuit Court should have heard and decided the case upon its merits. The administratrix was appointed by the Probate Court and can be removed by that court. The Probate Court allowed her claim and has power to vacate the order of allowance. The Probate Court recognized the defendant Reinhardt as a purchaser of certain claims and has power to ascertain the real nature of the transactions and make such adjustments, as equity may require. The defendant Davis, according to the allegations of the petition, fraudulently acquired certain assets of the estate under orders of the Probate Court. We cannot hold that it is beyond the power of that court to compel a return of these assets. While it is true that the petition deals with a number of claims and with a considerable variety of facts and circumstances connected with the administration of the estate, there is no reason for holding that any separate and distinct foundation for equitable jurisdiction is created.

The judgment of the Circuit Court is reversed and the case remanded.

REVERSED AND REMANDED.

Gridley, P. J. and Barnes, J., concur.

208 - 26868

FRANK EIKES and MARIE EIKES,
Appellees,

vs.

ALOIS BENES and MARIE BENES,
Appellants.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

224 I.A. 629

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

Appellees filed their bill of complaint in the Superior Court of Cook County July 8, 1919, to establish and foreclose a vendor's lien upon certain real estate formerly owned by them and which they had sold to appellants, who were defendants in the court below. The bill alleged that October 22, 1918, complainants sold and conveyed said real estate to the defendants for the sum of $13,400; that upon the consummation of the sale defendants paid to them $5,300, leaving a balance due of $5,100, which has never been paid and for which they received no security, and that by reason thereof complainants are entitled to a lien upon the said premises for the balance of the purchase money so due. The answer admitted the sale of the real estate by the complainants to defendants and the payment by defendants of the sum of $8,300 on account of the purchase price thereof, but specifically denied all other allegations of the bill. The case was referred to a master in chancery. After some evidence had been taken under the order of reference an amended bill was filed by leave of court without prejudice to the proceedings before the master.

The amended bill of complaint alleges that October 22, 1918, complainants jointly owned and were in possession of certain real estate and that they were also the owners of a stock of groceries and fixtures located in the building upon said real estate; that on said date they sold the real estate

to defendants for the sum of $11,000 and the business conducted thereon for the sum of $2,400, both of which were conveyed to defendants as joint tenants, and that the deed of conveyance of said real estate was duly recorded in the office of the Recorder of Deeds of Cook County; that said real estate was subject to a mortgage of $6,000, which defendants assumed and agreed to pay as a further consideration for said conveyance.

The amended bill further alleges that October 28, 1918, defendants were the joint owners of certain improved real estate in Chicago, which complainants purchased from them for the sum of $8,300, and as a further consideration for the conveyance thereof assumed a mortgage upon said real estate for the sum of $2,700, and that said last mentioned real estate was conveyed to complainants by defendants by warranty deed; that prior to the conveyance by defendants of said last mentioned real estate, on or about October 1, 1918, defendants represented to complainants that in order to close the transactions contemplated between them and to enable the defendants to deliver title to the real estate which they proposed to convey to complainants, it was necessary for them to obtain the sum of $800, which amount complainants loaned and advanced to defendants on that date; that the balance of the purchase price agreed to be paid for the premises conveyed by complainants amounting to $5,100, and the said sum of $800 advanced by complainants to defendants, making a total sum of $5,900, are still due from defendants to complainants; that no part of the same has been paid and no security given therefor. The amended bill prayed for an accounting between the parties and that defendants be decreed to pay to complainants whatever sum should be found to be due to them; that in default of such payment the premises first above described should be sold subject to the said mortgage of $6,000 upon the premises and that

in case of such sale and failure to redeem therefrom, defendants and all other persons claiming through or under them after the commencement of the suit be forever barred and foreclosed of all right in the premises.

The answer to the amended bill admits the sale by complainants to defendants of the said real estate and stock in trade for the aggregate sum of $13,400 and the conveyance of said property to defendants, and that the said real estate was encumbered to the amount of $6,000, which indebtedness defendants assumed; also that defendants were the owners of certain real estate in Chicago which they sold to complainants in consideration of the sum of $8,300 and the assumption of a mortgage upon said premises amounting to $2,700; also the receipt of $800 in cash from complainants but denies that it was advanced to defendants as alleged in the amended bill. The answer denies that there is anything due from defendants to complainants and says that September 28, 1918, the parties entered into an agreement of that date for the exchange of the two parcels of real estate above mentioned; that said agreement was reduced to writing and signed by the parties and a copy thereof is attached to the answer as an exhibit, and defendants offered to produce the original thereof upon the trial of the case.

The contract, a copy of which is attached to the answer, describes the property formerly owned by the complainants as number 5400 West Twenty-third street, Morton Park, Illinois, and the property owned by defendants as number 2433 South St. Louis avenue, Chicago, and provides for the sale of the first named property by complainants to defendants for the sum of $13,400, including the stock in trade and fixtures of the store, and the sum of $800 in cash in consideration of the

conveyance by defendants to complainants of the premises on South St. Louis avenue, for the sum of $8,500, subject to a mortgage of $2700. It contains no provisions whatever relating to the payment of the difference in the value of the respective equities in the two parcels of real estate. This agreement or a copy thereof was afterwards offered in evidence by defendants. After the master's report had been filed in court, there was a further reference of the case to the same master, with instructions to report as to whether or not this agreement bore the genuine signature of the parties. Pursuant to this order the master reported that the instrument in question did not bear the genuine signatures of the parties. Thereafter the court entered a final decree in favor of complainants the provisions of which will be noted later.

The master's report, pursuant to the original order of reference, was filed December 13, 1919. It reviews the pleadings, the substance of which has already been stated. The master found that the testimony offered by the respective parties was sharply conflicting and wholly irreconcilable, but that certain facts were shown about which there was no dispute; that at the time of the transaction Frank Zikes, one of the complainants, was a wholly illiterate person of low mentality and without ability to understand business matters; that his wife, Marie Zikes, was a woman of intelligence but without business experience and that she had, at the time in question, recently recovered from a very serious operation as a result of which she was in a weakened mental and physical condition; that both of the defendants were persons of intelligence and somewhat experienced in real estate transactions; that complainants were anxious to sell their property on account of the condition of health of said Marie Zikes; that negotiations between the parties followed and an agreement was finally made upon

the subject but that the testimony as to the terms of this agreement is conflicting. It was contended by complainants that they sold their property, including real estate and grocery business, for $13,400, subject to a mortgage upon the real estate of $6,000, to be assumed by defendants; that the purchase price of the real estate was $11,000 and of the grocery business $2400, and that complainants were to receive the property of defendants at a valuation of $8300, assuming an encumbrance thereon of $2700. It is contended by defendants that the exchange of the two equities was to be equal except that complainants were to pay defendants in addition, the sum of $800. The master further reported that the contract offered in evidence, which was attached to the answer of the defendants and purported to be the agreement between the parties, was not in fact their agreement; that on account of the physical condition of the complainant Marie Zikes an advantage was taken of her by the defendant Alois Benes, and that she was induced by him and the real estate man, who was called upon to prepare the necessary documents, to sign agreements other than those represented by the previous understandings and agreements between the parties. The master found that the actual transaction between the parties was substantially as set forth in the amended bill of complaint and that there was a balance due to complainants upon the purchase price and loan of $5900, which was wholly unpaid and for which no security had been given. The report recommended that a decree be entered in accordance with the recommendations of the report and with the prayer of the amended bill of complaint. Objections were filed to this report, which by stipulation of the parties stood as exceptions, and after a full hearing thereon and the report under the additional order of reference, which has already been mentioned, the court entered a final decree from which this appeal has been prosecuted.

The decree finds that complainants were the owners of

the property in Morton Park described in the bill of complaint, together with the improvements thereon and the stock in trade and merchandise located in the building; that the purported agreement offered in evidence before the master in chancery was not the contract signed by the parties September 26, 1918, and does not bear the genuine signatures of any of the parties thereto; that October 22, 1918, complainants sold said real estate to defendants for $11,000, and also on that date sold their merchandise and stock in trade for the sum of $2400; that the real estate was subject to a mortgage of $6,000, payment of which was assumed by defendants; that defendants October 22, 1918, sold and conveyed to complainants the real estate hereinbefore mentioned located on South St. Louis avenue for the sum of $8300, subject to a mortgage of $2700, the payment of which was assumed by complainants; that complainants advanced to defendants the sum of $800, as alleged in the amended bill of complaint, and that there was due to complainants upon the transaction the sum of $5900. The decree approved the several reports of the master in chancery and found that complainants had a lien upon the property formerly owned by them, which they had sold to defendants, for the sum of $5900, which amount defendants were ordered to pay to complainants with interest at five per cent from the date of the entry of the decree, within thirty days from that date, and in the event that said defendants failed to pay the said sum of money to complainants the master in chancery should sell the property subject to the said encumbrance of $6,000. The decree prescribed the manner and place of holding the sale and the terms thereof in conformity with the usual provisions of a foreclosure decree.

We have carefully reviewed the pleadings in the case and the evidence taken before the master and are unable to reach any conclusion different from those which are embodied in the

master's report and in the final decree as above set forth. The law is well settled that the findings of a master in chancery which have been confirmed by the chancellor will not be set aside unless clearly and manifestly against the weight of evidence. Smith v. Elevator Company, 278 Ill., 339; Klekamp v. Klekamp, 275 Ill., 102; Treloar v. Hamilton, 325 Ill., 107; Day v. Wright, 333 Ill., 222. It is true that the evidence upon many of the questions involved in the case is conflicting, but upon the whole we are of the opinion that the undisputed facts, which were established, are sufficient to sustain the decree of the Superior Court.

The decree of the Superior Court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

226 - 26836

S. C. FERGUSON,
Appellee,

vs.

JOHN HILDRETH,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

224 I.A. 629

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal Court of Chicago in an action of forcible detainer which was commenced November 8, 1920, by a complaint alleging that appellant, who was defendant in the court below, unlawfully withheld from plaintiff the possession of apartment number 2 on the second floor of the building at 6427 Kenwood avenue, Chicago. There is no claim for the recovery of the rent. No other pleading was filed by either party. The case was heard before the court without a jury, resulting in a finding and judgment in favor of plaintiff.

The lease of the premises in question, which was offered in evidence, provides, in substance, that its term shall commence on July 1, 1919, and terminate on October 31, 1920, provided the lessee gives the lessor a sixty day notice of his intention to terminate upon the date specified for its expiration. In case of failure to give such notice it was provided that the lease should continue from year to year until terminated by like notice in some ensuing year. It also provided that the lessor should have the power to terminate the lease upon a "like notice" to the lessee by mailing said notice to the above mentioned premises addressed to the lessee. The lessor, on August 4, 1920, served a notice to the lessee in due form of his intention to terminate the lease on October 31, 1920, the date when the term expired. This notice was served

upon the lessee by a delivery thereof to the wife of the lessee, who was in charge of the premises at the time.

It is contended by appellant that the notice was insufficient to terminate the lease for the reason that it was not sent by mail in accordance with the privilege accorded by the lease to the lessor of serving his notice in that manner. We cannot agree with this contention. The purpose of the provision in the lease providing for the giving of a notice to end the relationship of landlord and tenant at the expiration of the term was fulfilled more effectually by the delivery of the notice in question to Mrs. Hildreth than would have been the case if it had been mailed. It was a "like notice" to that required to be given by the lessee in such case. It was the intent of the parties in entering into these relations that the lease should not be terminated upon the expiration of the term specified, except upon a sufficient notice from the party electing to so terminate. The wife must be regarded as the husband's agent in matters of this kind, especially when she was in sole charge of the demised premises, which were the family domicile. She was liable for the rent and interested in the subject-matter of the suit. The husband did not deny the agency of his wife in the matter. When a party so conducts himself as to lead others reasonably to believe that a person is his agent, such party will not be permitted to deny a relationship the existence of which he has induced others to believe. Union Investment Ass'n. v. Geer, 64 Ill. App., 685. We are of the opinion that the notice served upon the lessee's agent as above indicated was sufficient to terminate the lease.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

-6-

2470

250 - 26911

LEO POLACHEK,
Appellee,

vs.

C. H. MORGAN GROCERY COMPANY, a corporation,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

224 I.A. 329

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

This is an appeal on behalf of the defendant in the court below from a judgment of the Circuit Court of Cook County against it and in favor of the appellee, who was plaintiff, for the sum of $1500 for personal injuries sustained by plaintiff in an accident that occurred in the City of Chicago October 4, 1918.

The evidence shows that October 4, 1918, a servant and employe of defendant was driving a delivery truck in a northerly direction on Woodlawn avenue in the City of Chicago. When he was proceeding along that street two machines traveling in a southerly direction approached the truck. These machines were abreast of each other and one of them attempted to pass the other and in so doing turned in an easterly direction, so that the driver of appellant's truck was compelled to turn towards the east curb in order to avoid a collision. At the time of the accident appellee was employed by the post office department as a special delivery messenger. He was riding on a bicycle in a northerly direction on Woodlawn avenue close to the east curb when appellant's truck turned in an easterly direction and collided violently with the bicycle. Appellee was thrown therefrom and received the injuries specified in the declaration. It is claimed on behalf of appellant that its driver did not see the bicycle in time to enable him to

stop so as to avoid the collision and that his view of the bicycle and its rider was obstructed by the approaching automobiles above mentioned. This contention is not sustained by the evidence. The driver testified that he saw plaintiff riding on his bicycle when the latter was ten feet away from him and that he stopped his truck within three feet from the point of the collision. It is possible that the driver's attention may have been distracted by the approaching automobiles, but it is difficult to see how they could have come between him and plaintiff so as to obstruct his view of the latter. We are of the opinion that the evidence justified the verdict of the jury finding that the accident was due to the negligence of appellant.

It is also urged as a ground for reversing the judgment that the verdict was excessive, it being contended that appellee's injuries were slight and that his recovery was complete within a short time after the accident. The evidence shows that at the time of the accident plaintiff was earning $25 per week as a special delivery messenger but that since the accident he has been unable to pursue steadily either that employment or any other, so that during a period of about two years intervening between the accident and the trial of the case he earned about $1100. The jury were justified in basing their verdict upon this evidence, which was undisputed. They doubtless fixed the amount of their verdict upon the theory of compensating plaintiff for his loss of earnings during the period mentioned. Under these circumstances we cannot say that the verdict was so grossly excessive as to indicate by its amount that it could have been reached only through passion or prejudice on the part of the jury, so as to justify a remittitur on that account.

The judgment of the Circuit Court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

262 - 26923

C. E. CANRIGHT,
Appellee,

vs.

JOHN D. KNAPP,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

224 I.A. 629

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

Judgment was recovered by plaintiff, who is appellee here, in the Municipal Court of Chicago for the sum of $551.67 and costs of suit, from which defendant has appealed. The action was brought upon defendant's promissory note, payable to plaintiff, dated June 9, 1920, for the sum of $540.87, due on or before September 1, 1920, with interest at six per cent per annum. Three affidavits of merits were filed, all of which were stricken from the files by order of court. Upon the entry of the order striking the last affidavit of merits, no leave to file an amended affidavit was asked and none given or refused. Thereupon the court assessed the damages and entered judgment.

It is contended by appellant that the trial court erred in striking from the files each of the affidavits in question. No consideration need be given to the first two affidavits. The motion to strike in each case was equivalent to a demurrer to the pleading. Chicago Rys. Co. v. Morris, 203 Ill. App., 449; Bradford v. U. S. T. & A. Co., 198 id., 505. When defendant filed an amended affidavit of merits he waived the right to assign error upon the order striking the former affidavit. S. & A. R. R. Co. v. Elmusen, 173 Ill., 100. Therefore it is obvious that the first two affidavits of merits are not before the court for consideration.

We have examined the third and last amended affidavit of merits and are of the opinion that the court committed no error in striking the same from the files. It does not state a defense to the action. It attempts to vary by parol the terms of a promissory note. The question of whether or not a contemporaneous oral agreement can be regarded as altering or changing the terms of a note has been passed upon frequently by the Supreme Court of this state, which has held uniformly that evidence of that character is not admissible. Mumford v. Tolman, 157 Ill., 258; Moore v. Prussing, 165 id., 319. Upon careful consideration of the last amended affidavit of merits, we are of the opinion that, admitting its statements to be true, it failed to allege a valid agreement that the note should not be paid.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

271 - 26932

JOHN C. WINSTON COMPANY,
a corporation,
Appellee,

vs.

HENRY J. NEUBRISTER,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

224 I.A. 630

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal Court of Chicago for $36.41 in favor of plaintiff, who is appellee here. The statement of claim alleges that there is due from defendant the sum of $36.41, being the balance due on a contract for a set of Winston's Encyclopedia amounting to $34 and interest thereon amounting to $2.41. The case was tried before the court without a jury. No brief is filed on behalf of appellee.

The evidence shows that in May, 1919, an agent of plaintiff called upon defendant and solicited the purchase by the latter of Funk & Wagnalls' "History of the World's War." Defendant signed an agreement to purchase this work for the sum of $8. Before the books were delivered, the same agent called upon defendant and stated that he required a duplicate copy of the contract which defendant had signed and submitted a printed paper, which he stated was a blank form of that contract. He asked defendant to sign the same, which the latter did without reading the document but relying wholly upon the agent's statement. The agent went away, taking the paper with him, and later a package of books was received by defendant, which he did not then open, assuming that they were the books ordered. He then sent his check to Funk & Wagnalls for $8 in payment for the "History of the World's War." Ten

days later another set of books were received by defendant. Upon opening the package he found that it contained a certain loose leaf encyclopedia purporting to come from plaintiff. Defendant then went to plaintiff's office and told the manager that he did not order the encyclopedia and did not want the books. The manager then showed the defendant what purported to be the copy of a contract. Defendant then told the manager that plaintiff's agent had represented that the document so shown him was merely a duplicate of defendant's contract for the "History of the world's War." Defendant requested an interview with the agent so that the dispute might be settled. The manager told defendant that he could not see the agent; that the agent was in California, the length of his stay there was uncertain, the agent was not then working for the company and that the manager did not care to communicate with him. The manager refused to take back the encyclopedia which was tendered to him. There was also some correspondence between the parties offered in evidence indicating that the only subject of their contractual relations was the "History of the World's War" above mentioned. This evidence is undisputed.

We are of the opinion that there was no contract between the parties relating to the loose leaf encyclopedia and that defendant was induced by a fraudulent trick to execute an instrument which he had no intention of signing. Under these circumstances a judgment in favor of plaintiff was unwarranted.

The judgment of the Municipal Court is reversed with a finding of fact.

REVERSED WITH FINDING OF FACT.

Gridley, P. J., and Barnes, J., concur.

271 - 26932

FINDING OF FACT.

We find as an ultimate fact in this case that there was no contract for the sale by plaintiff or the purchase by defendant of the books described in plaintiff's statement of claim.

26796 21502

138 - 26796

Certiorari denied

CHICAGO TITLE & TRUST COMPANY, a Corporation, Administrator with the Will Annexed of the Estate of JOSEPHINE C. KAHL, Deceased,

Appellant,

vs.

JOHN J. FOLEY,

Appellee.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

224 I.A. 630

MR. PRESIDING JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

In a bill of complaint filed in the Circuit court of Cook County the Chicago Title & Trust Company, administrator with the will annexed of the estate of Josephine C. Kahl, deceased, as complainant, alleged that deceased during her lifetime was possessed of and owned bonds of a value of more than $90,000; that said bonds after the death of said Josephine C. Kahl were in the hands of defendant, who claimed to be the owner thereof as the result of a gift inter vivos from decedent. The bill prayed for discovery, an accounting, that the bonds be decreed the property of the estate and that defendant be required to deliver them to the administrator.

The bill charged that the defendant, John J. Foley, was deceased's nephew, and for the greater part of the time during the last years of her life had acted as her agent and confidant; that he had attended to her business affairs and had the custody and control of her property.

The evidence in the case is voluminous. Stated briefly it shows that deceased was married to Frederick Kahl, her second husband, at Detroit, Michigan, in 1911; that prior to and after the marriage they were jointly interested in a manufacturing busi-

ness in that city. No children were born of this marriage nor of the marriage between decedent and her first husband. Josephine C. Kahl died in Chicago on February 20, 1916, leaving a will by which she bequeathed to her husband $100. At and prior to her death she owned a considerable estate. It was stated in oral argument that deceased and her husband had been estranged from a short time after their marriage until the time of Mrs. Kahl's death. At all events the evidence tends to show that while she resided in Detroit, Michigan, at the time of her second marriage, a short time thereafter she took up her residence in Chicago, and that except during visits made by her to Detroit in connection with the business in which she was interested, she had resided in Chicago up to the time of her death.

The evidence shows that she had brought up John J. Foley, her nephew, from his childhood and that she reported him as a member of her family. At the time of her death deceased was the owner of twenty shares of stock of the Frederick Kahl Iron Foundry Company located at Detroit; that on August 9, 1916, she received as dividends on the stock $5,780.50. Prior to the latter date deceased and appellee jointly occupied a box in the safety deposit vaults of the First Trust and Savings Bank, and later they jointly used a box in the Hibernian Banking Company's vaults, which was hired some time in the year 1916. Appellee transacted on behalf of deceased much of her business for about three years prior to her death.

Two principal questions were submitted to the trial court which tried the cause without a jury. The first was whether liberty bonds worth $4,000 at the time of her death were deceased's property or that of appellee; and, second, whether $45,000 par value of industrial bonds, which it is conceded was owned by deceased until some time in the year 1916, was the property of deceased at the time of her death. With reference to the liberty bonds the uncon-

tradicted evidence shows that they were purchased by appellee from the Hibernian Bank by making an initial cash payment therefor of $300 and by the execution by appellee of promissory notes, and that these notes were subsequently paid by appellee and the bonds delivered to him out of money received by decedent as dividends upon stock owned by her in the Detroit corporation, which money the evidence shows was given appellee by decedent at the time the payments were made.

As to the $43,000 industrial bonds appellee's position is that about sixteen or eighteen months prior to the death of decedent she had determined to give him these bonds, which were then deposited in the safety box in the Hibernian Bank vault jointly used by appellee and decedent; that with that end in view decedent and appellee went to the Hibernian Bank and consulted a Mr. Fitzgerald, manager of its bond department. Mr. Fitzgerald testified that at this time decedent informed him that she desired to give the bonds to appellee and that she asked to be advised as to how to accomplish this; that he, witness, told her he presumed she could make the gift by will, but before doing so he would consult the bank's lawyer; that subsequently decedent returned to the bank and requested witness to bring her to the lawyer; that he did so and that he, witness, decedent, appellee and his wife were present at an interview, during the course of which Mr. Eckert, the bank's attorney, informed decedent that if she left the bonds to her nephew by will her husband would have a dower right in them in case he desired to exercise his right, and decedent was asked by the lawyer if that was her intention, to which she replied, "No, the bonds are to be given to my nephew;" that the lawyer then said, "Under these circumstances you must make a gift of them during your lifetime;" that the lawyer again said to decedent, "If you leave these bonds by will to your

nephew, your husband would be able to exercise his right to claim his dower interest," and that she in reply stated that she did not wish her husband to have a dower interest, but wanted the bonds to go to her nephew; that at this time decedent spoke deliberately and slowly; that the lawyer then said, "If John after being made this gift was killed by a street car, he would be recognized as the owner of these bonds," to which deceased replied, "That is what I want done;" that deceased, appellee and his wife then "went down stairs;" that within an hour thereafter they returned and appellee said to witness in the presence of deceased that his aunt had given him the bonds; that witness was unable to recall what, if anything, decedent said to this, although the persons present chatted together for ten or fifteen minutes. Witness when pressed as to whether decedent at the time appellee made the statement had made any movement of her hands, head or body, replied, "I can't imagine things. The most natural thing in the world for me to say would be to say that she bowed her head." Afterwards, however, the witness returned to the stand and stated that when appellee made the statement that deceased had given him the bonds, "she kept bowing her head," and he indicated an up and down motion; that he was confused by the lawyers and the court when he had made the statement last above quoted. This witness also testified with relation to the Liberty bonds purchased from the bank by appellee that the balance due thereon was paid out of a $12,000 draft payable to deceased which had been sent to the bank from Detroit; that by direction of deceased $8000 of the amount of the draft was given in payment of appellee's notes and the balance due on the draft was paid to appellee in cash. This witness also testified that deceased was of sound mind at the time of the transactions about which he testified, and that she appeared to be a healthy woman; that he, witness, thought the conversations related by him took place just before December 1, 1916; that the conversa-

tion had with deceased concerning the $8,000 Liberty bonds occurred about September 5th or 6th, 1917.

Other evidence tends to show that appellee, after the transactions referred to, collected interest coupons on the bonds. At the time appellee purchased the Liberty bonds certain of the industrial bonds were deposited by him with the bank as collateral to secure the payment of the notes.

There is some evidence in the record which was admitted for the purpose of contradicting statements made by Fitzgerald; this refers in the main to a conversation had by him with a Mr. Gardner, a representative of complainant. It is said that Gardner's testimony impeaches everything Fitzgerald said material to the alleged gift. We are not ready to accede to this. Mr. Gardner's testimony is to the effect that he held a conversation with Mr. Fitzgerald in June, 1918, and that Fitzgerald then said that deceased informed him that she wanted to transfer some bonds to appellee and that he referred her to the lawyer for the bank; that he, witness, and Fitzgerald, then talked with Nebard, the bank's attorney, and that Fitzgerald said he knew nothing further than he had told Gardner. This witness testified that Fitzgerald had said nothing to him about deceased's and appellee's return to Fitzgerald's desk, at which time Fitzgerald testified, appellee made the statement that decedent had given him the bonds. As we read this testimony, the only thing in it that tends to contradict Fitzgerald's testimony is that he failed to inform Gardner of the return of decedent and appellee to his desk and the statement of appellee in the presence of decedent; nor are we able to find anything in certain letters sent by Mr. Fitzgerald to Mr. Gardner which materially contradicts anything Mr. Fitzgerald said as a witness, except that no reference is made in this correspondence to the alleged gifts to appellee.

It is undisputed that on February 14, 1917, appellee rented for his individual use a safety deposit box in the vaults of the Northern Trust and Safe Deposit Co., and a witness for appellee, Nartel, testified that he accompanied appellee to these vaults and there saw 43 bonds of $1,000 each; that he had four months prior to this seen these same bonds in a safety box in another vault; that he had made a memorandum of the bonds and copied names and numbers of every one; that at this time Foley clipped coupons from the bonds; that Foley had asked him to make the memorandum which he made; that he had given the memorandum to him.

For the complainant it is urged that the only evidence offered by defendant in proof of an actual delivery of the bonds was the testimony of Mr. Fitzgerald. We are unable to agree with this contention. Mr. Fitzgerald's testimony, if believed, shows that it was deceased's intention to give the bonds to her nephew who had been for some years her confidential aid. Her relations with defendant and his father were intimate; some time before her death she kept a joint savings account with defendant's father.

Only by inference is the testimony of Mr. Fitzgerald attacked. No direct contradiction is made of his statement that decedent advised with him about her expressed intention to give the bonds to appellee, or that following explicit advice from the bank's attorney she had gone down stairs in the bank in company with appellee and had within an hour thereafter nodded her head in apparent approval to appellee's statement to Mr. Fitzgerald that decedent had given him the bonds. One might be justified in entertaining doubt of an actual delivery from this evidence if it stood alone. There is abundance of other evidence in the record, however, which tends to establish a delivery of the bonds to appellee. It is undisputed in the evidence that the bonds were taken out of the vault in the Hibernian

Bank more than a year before deceased's death, and placed by appellee in a box in the vaults of another bank; that during the last year of decedent's life appellee on one occasion, and on another his wife, collected interest coupons on the bonds.

A Mrs. Lally testified that deceased, about the middle of December, 1916, told her that she had been in town the day before to the bank and had given appellee $43,000 worth of bonds; that deceased on another occasion in September, 1917, had said that she had given appellee $5,000 in money to buy liberty bonds.

A Mr. Rapp, father of appellee's wife, testified that in January, 1917, at witness' home, decedent, referring to the gift to appellee, had stated to the witness, "Did Johnnie tell you about the gift of the bonds I gave him? I made him a present of all my bonds; yes, I have given him $45,000 worth of bonds outright, and I hope he will be a good boy and take care of them;" that at a subsequent visit at deceased's home in June, 1917, deceased, referring to the liberty bonds had stated, " haven't given him all the $5,000, but I will give it to him when I return from Detroit."

The evidence tends to establish a gift of the money with which the liberty bonds in question were purchased and an actual delivery of the $43,000 of industrial bonds. If it be true, as stated, that deceased had become estranged from her husband whom she married late in life and with whom she had resided only a short time, and that she had a strong affection for her nephew, appellee, as appears to have been the case, then there is nothing unbelievable in the testimony of appellee's witnesses. If, as a matter of fact, it was her desire to have him participate in such large measure in her estate, she wisely adopted the advice said to have been given to her by Mr. Hebard.

It is asserted, however, for the complainant that ap-

pellee's admissions made in September, 1918, before the Inheritance Tax Commission of Illinois, show that deceased did not part with her dominion over the bonds in question prior to her death. This evidence was introduced by complainant as an admission by defendant against his interest and "in the interest of the truth of the statements as to the nature of his claim to the right of the property." This evidence shows that appellee stated before the Commission that he acted as agent for his aunt (deceased); that he had no right to draw money from deceased's account in the bank as such agent; that he continued to act as her agent going on three years until sometime after he was given the bonds. While part of defendant's testimony before the Commission introduced on the trial by complainant seems in slight measure to have been against his interest, the principal part, however, tended to establish the gift of the bonds and money as alleged in defendant's answer. This evidence, which was admitted on request of complainant tends to prove ~~the~~ a direct gift of the bonds to defendant. In connection with the admission of these statements of Foley we find in the abstract of record:

> "Mr. Sadler: I offer that as testimony given under conditions named, by defendant, John J. Foley, at time in question, which was hearing in September, 1918, before Inheritance Tax Commissioner, where John J. Foley was sworn as witness, as showing source by which he claims title and likewise admission to time when he admitted they were in possession and the property of Josephine G. Kahl."

From the above quotation it appears that complainant's counsel introduced this testimony for the purpose of showing the source by which the defendant claimed title to the bonds, and this evidence when examined shows that defendant's claim before the Commission was that the bonds were given to him by deceased about 16 or 18 months prior to her death.

It is also urged that the evidence shows that deceased exercised control and dominion over the bonds in question for a con-

siderable time after the making of the alleged gift of the bonds. This contention is based upon certain statements made by Mr. Fitzgerald in a letter to Mr. Gardner. This letter is dated June 26, 1918, and in it Mr. Fitzgerald stated:

> "I recall that Mrs. Kahl always cashed her coupons herself, nearly always in company with her nephew, John J. Foley, and his wife. I further confirm my statement to you that on one instance I distinctly recall Mr. Foley cashing them and it may have been on two instances of which I am not sure. This was likely during Mrs. Kahl's sickness. This covers the entire period from the time of the purchase of these bonds to date of Mrs. Kahl's death."

Even if the above statement is admissible and correctly states the facts, we do not think that it can be said therefrom that deceased had cashed the coupons after the giving of the bonds to defendant. The letter says that defendant may have cashed the coupons on two instances, and it is uncertain from the language of the letter whether deceased collected interest on the coupons before or after the date of the gift.

It is urged that evidence introduced for complainant of records made by the keeper of the Hibernian Bank vaults tends to show that no person had access to the safety box jointly used by deceased and appellee at or about the time when it is said the bonds were given to defendant. Testifying from his record the witness keeper said that entrance was had to the box on October 2, 1916, by deceased, and on December 4, 1916, by defendant; that September 6, 1916, was the last date upon which both the defendant and deceased had access to the box. The testimony of this witness is somewhat weakened by the fact that he stated that "in stress of business it is likely some person would be let in or some other person accompany a person," of which the records might contain no mention. The importance of this evidence is also affected by the uncertain date of the alleged gift of the bonds. Deceased died February 20, 1918, and the evidence as to the date of the alleged gift variously fixes it at 16 or 18 months prior to the death of deceased, or at some time

in the latter part of the year 1916 or the early part of the year 1917. Mr. Fitzgerald fixes the time at about December 1, 1916, or about three weeks prior thereto; no one attempts to fix the exact time of the gift.

It is contended that the evidence shows that defendant was possessed of only $35,000 par value of industrial bonds at the time of the alleged gift. Here, again, the uncertainty as to the time of the gift renders it difficult to say whether decedent had a total of $43,000 par value of the bonds at the time the gift was made. The last of these bonds were purchased on December 14, 1916, and the evidence is undisputed that on or before this date she had declared to Mr. Fitzgerald her purpose to give the bonds to defendant.

It is urged that the defendant during the year 1917, and after the time of the alleged gift of the industrial bonds, signed five ownership certificates which were filed with the Revenue Department of the United States Government, in which he declared that decedent was the owner of the industrial bonds and that the statements were made by him as her agent. There is nothing in the point that the signing of the statements by defendant tended to defraud the government. The statements were signed for the purpose of enabling the government to collect an income tax on the income derived from the bonds. There is suggestion in the evidence that decedent collected interest on the bonds after the gift to defendant. The record shows that defendant attempted to prove that some months prior to the death of decedent he had in fact made a return to the government to the effect that he was the owner of the bonds. This evidence was excluded. Under the circumstances we do not think that the statements signed by the defendant should be taken as conclusive against his right to the bonds.

It is also contended that the defendant bore a fiduciary relationship to decedent at the time of the alleged gift, and that she was at the time somewhat mentally impaired. The evidence does tend to prove that defendant was decedent's trusted aid in the transaction of her business. This evidence does not, however, disclose that these transactions were not conducted as desired and directed by deceased; it does not show that she was dominated in any manner by the influence or conduct of defendant. All that is shown is that he was of material assistance to her in attending to her business.

Ida M. Black testified that deceased was of somewhat unsound mentality for some months before her death, and she is corroborated by other testimony. The evidence upon this question was contradictory. Several witnesses for defendant, including a physician, testified that deceased was of sound mind at all times within their knowledge up to the time of her death, and certain of these witnesses were brought in almost constant association with her.

While the evidence introduced on both sides of the controverted questions of fact in the case is on material points in direct conflict, it is of such character that we are not authorized to say that the chancellor erred in his findings thereon. These findings are well supported by evidence introduced on the trial. While there is no direct evidence which shows that deceased actually delivered the bonds in question to defendant, that the delivery was made may be justifiably inferred from the evidence. The direct proof of his possession of the bonds for more than a year preceding his aunt's death is contradicted only by inference.

It is our opinion that on the whole evidence the chancellor was justified in finding, as he did, that the bonds were delivered by decedent to defendant. Decedent and appellee were closely related; the uncontradicted evidence shows her affection

for and trust in him. For some reason her purpose, as shown by her will, was to bequeath to her husband, who seems to be the only person actually interested in defeating the gift, only the sum of $100.

In the case of Sears v. Vaughan, 330 Ill. 372, it was contended that a donee, a relative of a donor, was required to prove by clear and satisfactory evidence that she, the donee, had acted in good faith and had not exercised an undue influence upon the donor. In answering this contention the Supreme court said:

> "This position cannot be maintained. The rule contended for is applicable to cases of attorney and client, guardian and ward, and parent and child, where the parent receives a gift or other benefit from the child. But the rule is not applied where the parent makes a will or other provision for his child. In our opinion, this case ought to be governed by the same rule in this respect as would apply between father and child."

While the relationship in the present case is not technically that of parent and child, we think the language and the reasoning of the above authority is peculiarly applicable here. Where, as in the present case, it appears that a relationship substantially that of parent and child exists between a donee and a donor of a gift and that resulting therefrom a confidential association has grown up between them, and that the donee did not occupy a superior position therein, the rigorous rules of ordinary fiduciary relationships are not applicable. The evidence in the case, however, does not show that defendant had exercised any undue influence upon decedent, or that he had acted other than in the utmost good faith toward her. His conduct seems to have been no different from what it would have been had he been her son. He appears to have shown a natural desire to aid her and that she trusted him is no reason why an inference should be drawn that he had taken unfair advantage of her confidences. There is evidence which warrants the conclusion that the deceased entered into the transaction with full knowledge of its nature and effect; that she acted deliberately and with an intelligent

desire of protecting the person, above all others, for whom she seemed to have had affection.

The case of Martin v. Martin, 174 Ill., 372, is in essential particulars like the case at bar. The decision in that case answers many of the objections made by counsel for complainant, as, for instance, that declarations by the holder of an unendorsed note, during her possession thereof, to the effect that she had been given the note by the payee named therein before his death, were admissible as tending to show her claim of ownership, and also that:

> "The law will not require one in the possession of a chattel or security, negotiable or otherwise, under the claim of ownership, to deliver the same over upon the mere adverse claim of another, but will only disturb such possession upon proof of the right of such adverse claimant, - that is to say, the presumption of the law is that one so in possession is prima facie entitled to remain in possession until the contrary is made to appear by proof."

There is not much doubt that decedent was in actual possession of the bonds in question for several months prior to the death of deceased. It appears from the facts in the Martin case, that a niece of Edward Martin had lived with him after she reached the age of nine years and that for fourteen years prior to his death she had full charge and care of his home. Sometime prior to his death he gave her certain notes and securities which the executors of his estate attempted to acquire by legal proceedings for the estate. The Supreme Court after an examination of the evidence said:

> "We find nothing in this testimony which can fairly be deemed to militate against the presumption of ownership arising from the possession of the defendant in error, or otherwise to operate adversely to her cause. Upon the contrary, we think a fair and impartial consideration of the testimony sufficiently establishes that the defendant in error came into possession of the notes by acts of the decedent xkx done for the purpose of constituting her the owner thereof. The suggestion she held them for safe keeping, or otherwise, as a mere bailee, cannot be reconciled with the evidence."

We think defendant should have been permitted to show by his declarations made to the Revenue Department of the United States Government that he claimed ownership of the bonds after the time of the alleged gift, but aside from this there is ample evidence to support the findings of fact in the decree.

In the Martin case, supra, the Supreme Court said:

> "We think the court erred in excluding from consideration such of the declarations of the defendant in error as amounted to a statement or claim of ownership in her. (King v. Cook, 4 Gilm. 336; Yates v. Shaw, 24 Ill. 368; Rowley v. Hughes, 40 id. 316; Amick v. Young, 60 id. 542; Whitaker v. Whaley, 44 id. 440; Thomas v. Town of Butler, 38 N. E. Rep. 4[illegible].)"

Actual delivery of the gift may be inferred from facts and circumstances in evidence, the most potent of which usually is actual possession in the donee with a claim of ownership. Moore vs. Brandenburg, 179 Ill. App. 253; Martin v. Martin, supra.

In the case of Gilmore v. Lee, 237 Ill. 411, relied upon by complainant, the Supreme Court said:

> "Every confidential relationship implies a condition of superiority by one of the parties over the other, and if the superior obtains a benefit, such as a gift, equity raises a presumption against its validity," etc.

The facts in that case are widely different from those of the present case. No relationship at all existed in the Gilmore case between the donor and the donee, except a confidential one, where the dominant influence was that of the donee. But even if the law did cast upon defendant the burden of proving that the gift was the voluntary, intelligent act of deceased, and that he, defendant, had acted in the utmost good faith, the evidence introduced in his behalf is sufficient to warrant the findings of the chancellor in his favor.

Other questions relating to the admissibility of evidence are discussed in the briefs, as to which we think no reversible error was committed. There was ample admissible evidence

in support of defendant's position on the controverted questions of fact.

The decree of the Circuit court is affirmed.

AFFIRMED.

McSurely, J., concurs.

Matchett, J. I concur with some doubt on the question of delivery.

3.845

185 - 26845

ETHEL MARMOR,
Appellee,

vs.

HARRY RICHMAN,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

224 I.A. 630

MR. PRESIDING JUSTICE DEVER
DELIVERED THE OPINION OF THE COURT.

The defendant appeals from a judgment in favor of the plaintiff entered in the Municipal court of Chicago in an action brought by plaintiff to recover possession of a living apartment in a building located at No. 1324 Independence boulevard, Chicago.

By written lease dated May 1, 1918, Harris Podlesky, the then owner of the premises in which the apartment is located, rented the apartment to defendant for a period of two years ending April 30, 1920. This lease as originally drawn and executed by the lessor contained the following clause:

> "That the said lessee will give lessor written notice sixty days prior to the expiration of this lease, or any extension thereof, of his intention to vacate said premises or renew this lease, and a failure of said lessee to give such notice shall operate as a renewal of the tenancy for the further period of one year, at the option of the lessor."

Thereafter, in January, 1920, the property was sold by Esther Hart Stone, the lessor's grantee, to the plaintiff and the lease in question was assigned to plaintiff by a written assignment bearing date January 6, 1920.

Evidence admitted shows that Pearl H. Hart, sister of Esther Hart Stone, conducted negotiations on behalf of Podolsky which led to the execution of the lease. The lease appears to have been kept by Pearl H. Hart in a vault until January 6, 1920, the date of its assignment to plaintiff. At this time the de-

fendant was negotiating with her, Pearl M. Hart, for a new lease for the apartment. Some considerable time after the execution of the lease and while Esther Hart Stone was the owner of the property, defendant, without her knowledge or without the knowledge of Podlosky, who executed the lease, and before he, defendant, had signed it, procured Pearl M. Hart to strike from the lease the clause above quoted and insert in lieu thereof, by way of rider, the clause as follows:

> "It is further agreed that the said lessee will give lessor notice, sixty days prior to the expiration of this lease, or any extension thereof, of his intention to vacate said premises or renew this lease."

If it be true, as asserted by counsel for defendant, in a part of his argument, that the language of the clause is ambiguous, such ambiguity cannot be removed by the introduction of the parole evidence offered. Such evidence would not tend to explain away the ambiguity; it would merely add new conditions to the contract, fixing, for instance, the length of the term and the rentals to be paid by defendant. This court will not undertake to make a new contract for the parties, which would be necessary if we were to adopt as sound the contentions of defendant. Diederich v. Rose, 228 Ill., 510. It is our view, however, that the clause in question did not confer upon defendant a right to a renewal of the lease. Such renewal right is not expressed in the rider attached to the lease. This clause provided merely that the defendant, as tenant, was required sixty days prior to the expiration of the lease to give notice of his intention to vacate the premises or to renew the lease. The language of the rider is substantially the same as that of the paragraph which was stricken from the lease, except that as it originally stood the paragraph contained the clause, "and a failure of said lessee to give such notice shall operate as a renewal of the tenancy for the further period of one year, at the option of the lessor."

offered.

the

In the case of Levering Inv. Co. v. Lewis, 208 S.W. Rep. 874, cited by plaintiff, the court construed the following clause contained in a lease:

> "And the said lessee hereby expressly agrees to give formal notice to the said lessor at least thirty days before the expiration of this lease of his decision as to the relatting or surrender of the premises hereby leased."

This quoted language is in substance the same as that of the rider in question. In deciding the case the court said:

> "What is claimed as an agreement is at best a one-sided agreement for a renewal. We say a 'one-sided agreement,' for by this interpolated clause it is stipulated that if the lessee gave his notice of intention to renew the lease thirty days before the term expired, it was optional on the lessor to renew. For all of the thirty days intervening between the thirty days and until the end of the term specified in the lease, it was at the option of the lessor to determine whether the lease should be renewed or not, and the defendant could not know whether or not he had a lease."

Clearly, the language of the rider will not bear the interpretation placed upon it by defendant. If it be given the meaning urged by defendant it would follow that he would have right to a renewal of the lease; that is, of the whole lease with the rider attached, and this without any express agreement as to the term, rentals or other conditions.

Aside from the question of authorization, if the rider in fact became an integral part of the lease, as urged, the defendant would have a right within sixty days of the end of each successive term to a renewal of the lease which would permit him on the terms contained in the original instrument to retain possession of the premises indefinitely. This construction of the language of the rider would amount almost to an absurdity.

Clauses of the kind in question are not unusual in leases, a particular purpose for their insertion being that the owner of the premises may have sufficient time and opportunity to

advantageously relet the premises. Such provisions call upon the tenant to speak concerning his intentions as to a new contract for the premises, thus giving the owner of the premises an opportunity by negotiations either with the lessee or other persons for a relatting of the premises.

The evidence tends to disclose that neither Podolsky, the original owner, nor his assignee, Stone, had any knowledge of the attachment of the rider to the lease. The lease was assigned to plaintiff about the time that defendant procured Pearl M. Hart to attach the rider to the lease; that the latter had no authority to attach the rider is clear. The evidence does not warrant a holding that the plaintiff or her immediate assignor had ratified the unauthorized act of Pearl M. Hart.

No reversible error was committed by the trial court in rulings upon questions touching the admissibility of evidence. Such rulings, even if erroneous, would not, in view of our holding that the rider did not confer upon the defendant a right to a renewal of the lease, constitute reversible error.

The judgment of the Municipal court is affirmed.

AFFIRMED.

McSurely and Matchett, JJ., concur.

26855

198 - 26855

SARAH ALTHAUSEN,
Appellant,

vs.

SARAH KOHN,
Appellee.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

224 I.A. 630

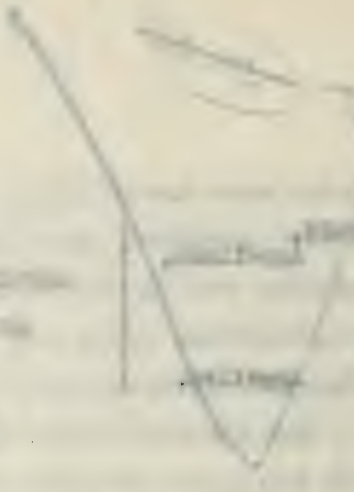
MR. PRESIDING JUSTICE DEVER
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in assumpsit in the Circuit court of Cook County against defendant, Sarah Kohn, on a promissory note, the payment of which was secured by a second mortgage on real estate. The note contained a warrant of attorney to confess judgment. It matured October 22, 1920, and defendant having defaulted in payment of the principal a judgment was entered by confession on the note for the sum of $10,566.66, which included $500 as attorney's fees. Later an order was entered in the cause allowing the defendant leave to plead to the declaration, the judgment to stand as security.

Defendant filed a plea in which she admitted that $8860 was due plaintiff, and on a trial before a jury a verdict was rendered in plaintiff's favor for this amount. On the trial plaintiff introduced the note in evidence with testimony which tended to show that the principal sum mentioned therein was due.

Evidence was introduced by defendant which tended to prove that her property was managed by her brother; that in October, 1919, she applied through him to Sol Rubin, a real estate broker, for information as to where she might obtain a second mortgage loan of $9500. Rubin directed him to plaintiff, with whom it was agreed that a loan of $10,000 should be made to defendant.

It is admitted that defendant actually received $9410



out of which she paid an attorney ten dollars for drafting the papers and four dollars for revenue stamps and recording fees. The plaintiff's position is that she was and is an innocent purchaser for value of the note without notice of usury, and that in a suit at law she is protected from this defense. The usury defense seems to have been sustained by the jury and the trial Judge.

There is a conflict in the evidence as to whether the defendant originally dealt with plaintiff or with her daughter. It is admitted that the sum of $550 was paid by plaintiff apparently as unearned interest on the principal note. The main question in dispute on the trial was whether the sum of $590 which the plaintiff says was paid for commissions was in fact paid to the plaintiff or to some other person for negotiating the loan. The jury evidently concluded that this commission was actually paid to the plaintiff. Plaintiff's daughter testified that she was compelled to pay the sum of $300 to Rubin, the broker; this testimony was objected to, which objection was sustained. Plaintiff's daughter further testified that she borrowed $8500 of the money which she delivered to defendant from the Liberty Trust and Savings Bank; that she gave her personal note secured by collateral; that some weeks afterwards she sold the note to her mother for $10,000.

A judgment was entered on a verdict of the jury for the sum of $8860, which the plaintiff seeks to reverse by her appeal to this court.

As the case must go back to the trial court for a new trial, we express no opinion as to the weight of the evidence touching the disputed questions of fact. It is our opinion, however, that the court erred in refusing to admit evidence to the effect that at least $300 of the $590, the amount deducted from the face amount of the note, was paid by plaintiff's daughter by way of commission to the broker who negotiated the loan.

The burden of proving the defense of usury was upon the defendant, and to sustain this burden she attempted to prove, first, that the plaintiff was an actual party to the original transaction, and, second, that the commissions deducted from the loan were in fact received by plaintiff or her daughter.

In the case of Abbott v. Stone, 172 Ill. 634, the court said:

> "The appellant's contention that $400 was retained by appellee Stone is not tenable. The receipt of appellant showed that the $400 was paid Wm. L. Pierce & Co., as commission for procuring the loan for appellant. Stone, the lender, cannot for that reason be charged with usury. Usury being alleged by appellant, the burden was on her to prove it, and it was her duty to establish it by a preponderance of the evidence."

Telford v. Garrels, 132 Ill. 550.

Evidence was admissible which tended to show that Rubin was defendant's broker and that he received the sum of $300 as commission upon negotiating the loan. Error was also committed in giving to the jury the instruction following:

> "The court instructs the jury that if you find from the evidence in this cause that at the time defendant executed the note of $10,000 she only actually received ($9,410.00) and that thereafter the defendant paid to the plaintiff in this case of the sum of $550 on account of interest; that under the law the sum of $550 should be deducted from the amount she actually did receive, that is $9,410, if you find that this is the amount she actually did receive and from the said amount the sum of $550 should be deducted and the same applied on the principal."

This instruction makes no mention of the contested question of fact concerning the commissions. By the instruction the jury were told that if the defendant received $9410, which is admitted, and afterwards repaid to plaintiff, by way of interest, the sum of $550, which fact is also admitted, then the latter amount was to be deducted from the former. In giving this instruction the trial Judge should have called the attention of the jury to the disputed questions of fact concerning the commission. As given, the jury might well have concluded that the sum of $8860 only was due the plaintiff. While a point is made that the judgment should have included a sum for

The burden of proving the defense of insanity was upon the defendant, and he would take towards the attempted it proving, therefore, that the plaintiff was an absent party to the original transaction, and, second, that the circumstances developed from the time was in fact affected by plaintiff's sole discretion.

In the case of *Albert v. Jones*, 178 Ill. 594, the court said:

> "The objection's contention that this was violative of specific items is not tenable. The results of evidence showed that the bill was paid on, by Jones & Co., as mortgagee for protecting the best for creditors. Among the letters, found in that place the original with counsel. Among other things contained in the letters, the bankrupt was an bar to where it, and if the fact is established it by a preponderance of the evidence."

Tobias v. Kunzle, 108 Ill. 295.

Evidence was adduced which tended to show that Jones was defendant's father and that he managed the sale at first as agent, making upon negotiating the trade. Among the conversations given to the jury the testimony stated:

> "The agent informed the jury that he if you find from the evidence in this case that at the time defendant received the sum of $30,000 the only absolutely required $8,000 and that therefore the defendant paid to his principal in this sum of the sum of $300 on account of bankrupt, then under the law the sum of $300 ought to deducted from the amount you assessed the twenty. That is to say, if you find that $22 is the amount the agent of defendant and the same applied on the sum of $300 should be deducted and the same applied on principal."

This instruction being an motion of the defendant contention of fact concerning the transaction. By the instruction the jury were told that if the defendant received $8,000, which is admitted, and afterwards paid to plaintiff, in his at interest, the sum of $300, which fact is also admitted, then the latter amount was to be deducted from the former. In giving this instruction the trial judge should have added the criterion of the jury in the doubtful question of fact concerning the transaction. As affirm, the jury might well have concluded that the sum of $300 only was the plaintiff's. There is proof in such that the payment plaintiff from received a sum that

attorney's fees, that question is not argued in the brief submitted by counsel for plaintiff. We therefore express no opinion thereon.

The judgment of the Circuit court is reversed and the cause remanded to that court for a new trial.

REVERSED AND REMANDED.

McNurely and Matchett, JJ., concur.

27532

207 - 26867

J. BROCKMAN, Doing Business as THE STANDARD BARGAIN HOUSE,
Appellee,

vs.

MAX GERRICK et al., Copartners, doing Business as CHICAGO JOBBING HOUSE,
Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

224 I.A. 630

MR. PRESIDING JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

A judgment was entered in the Municipal court of Chicago in favor of plaintiff for the sum of $1193.50, to reverse which defendant has brought the case to this court.

Plaintiff's statement of claim alleges in substance that defendants were indebted to him for goods sold and delivered on January 9, 1920, and January 22, 1920, in a total sum of $1193.50. An affidavit of merits was filed by defendants on the 25th of August, 1920. On motion of defendants January 13, 1921, they were given leave to file a set-off against plaintiff and plaintiff was given ten days to file an affidavit of merits thereto. January 14, 1921, defendants filed their claim of set-off and also on the same day, without leave of court, filed a new affidavit of merits. January 18 1921, the affidavit of merits and the set-off were, on motion of plaintiff, stricken from the files and defendants were denied leave to file an amended affidavit of merits and set-off.

The record before us contains no bill of exceptions, certificate of evidence or report of the trial signed by the trial Judge, as required by section 81 of the Practice act. Defendants in their assignments of errors say that the trial court erred in trying the cause upon an affidavit of merits filed June 25, 1920,

and in striking from the files an affidavit of merits and claim of set-off filed January 14, 1921. From an examination of the abstract of record we are unable to find that an affidavit of merits was filed on June 25, 1920. An affidavit of merits was filed August 25, 1920, but this seems to have been abandoned by the filing of a new affidavit of merits on January 14, 1921. But whatever might be held were the question of the sufficiency of the affidavit of merits or the claim of set-off before us for decision, the defendants by their failure to include in the record a bill of exceptions or certificate of evidence have made it impossible for us to determine the main question argued by counsel for defendants.

In the case of Sheppard Strassheim Co. v. Hickman, 207 Ill. App. 370, the court said:

> "But were the appeal properly perfected we could not consider the only point made, namely, that the affidavit of defense was erroneously stricken and judgment entered by default, because the motion and decision of the court thereon are not preserved in the bill of exceptions, thus not enabling us to determine the ground of the court's action, which otherwise is presumptively correct."

In the case of People ex rel. v. Harrigan, 291 Ill. 206, the Supreme Court held that:

> "The clerk of the Circuit court has copied into the transcript of the record the motion of defendant in error to dismiss the appeal purporting to be filed at the September term, and also a copy of the appeal bond purporting to have been filed by plaintiff in error in answer to said rule of the Circuit court. A number of other motions and bonds of similar character purporting to be filed at said term, and also a number of other such instruments purporting to be filed at the January term of said court, 1918, have also been copied into the record, and also the orders of the court and its rulings thereon. None of said motions and bonds or other matters have been included in any stenographic report, bill of exceptions or certificates of evidence, as required by section 81 of the Practice act, in order that such matters may become a part of the record, and therefore they can not be considered as part of the record."

In the case of Gayner v. Hibernia Savings Bank, 166 Ill. 577, the Supreme Court said:

"The only error alleged is that the court erred in striking the plea from the files, and it has been repeatedly held that such action of the court cannot be considered unless the motion, decision and an exception thereto are presented in a bill of exceptions, so that the error, if any, may appear from the record."

We are asked to affirm the judgment with 10% damages, because, as it is said, the record shows that the appeal was taken solely for delay. For the purpose of determining this question we have examined the pleadings in the cause. The original affidavit of merits filed August 25, 1920, set up that the goods delivered to defendants were not the goods ordered by them nor in accordance with a submitted sample. In an affidavit of merits filed January 14, 1921, the defendants set up as a defense that the plaintiff on the 7th of November, 1919, had delivered to defendants certain overcoats, for which defendants paid plaintiff $1887; that these overcoats were not according to a submitted sample and were not of the size ordered. Substantially the same facts are alleged in defendant's statement of set-off. Neither the affidavit of merits nor the set-off shows that defendants had a defense to the suit brought by plaintiff nor that plaintiff was indebted to them in any sum whatsoever. It is our opinion, therefore, that the judgment should be affirmed with statutory damages of $119.

The judgment of the Municipal court is affirmed and a judgment is awarded here in favor of the plaintiff as damages in the sum of $119.

JUDGMENT AFFIRMED WITH DAMAGES.

McSurely and Matchett, JJ., concur.

2154

Returned

230 - 26890

BOARD OF EDUCATION OF THE CITY OF CHICAGO, a Corporation,
Appellee,

vs.

AVA W. FARWELL,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

224 I.A. 631

MR. PRESIDING JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

The defendant appeals from a judgment entered against her in the Municipal court of Chicago in favor of the plaintiff for the sum of $46,655.87.

The sole question before us is whether affidavits of merits filed in the cause set out a sufficient defense to the cause of action alleged in plaintiff's statement of claim.

Plaintiff in its statement of claim charges that the defendant was indebted to it for rent due under a certain lease and a supplemental agreement thereto; that the Board of Education of Chicago on May 8, 1880, entered into a written lease of certain premises with one Beverly R. Chambers; that he subsequently died, and five-eighths of his interest in the lease vested by descent in Ava W. Farwell and Alice F. Chambers, her mother; that prior to his death Beverly R. Chambers assigned to his father, Jerome B. Chambers, three-eighths interest in the lease and on the death of the latter this three-eighths interest also became vested in defendant and her mother; that June 15, 1888, defendant and her mother being the owners of the lease, entered into a supplemental agreement with plaintiff; that Alice F. Chambers died and her interest in the leased property vested in defendant, who became thereby the sole owner of the leasehold interest.

Prior to the making of the supplemental agreement defendant and her mother had filed a bill in equity in the Superior court of Cook county, in which they prayed for an appraisal of the property in accordance with the terms of the original lease; the matters in controversy in that suit were adjusted by the making of the supplemental agreement, a material part of which is as follows:

> "Whereas, on the 8th day of June, 1888, certain terms of settlement were adopted and approved by the Board of Education of the City of Chicago, and party of the first part, by its President and Secretary, were authorized to execute with party of the second part an instrument in writing as a supplement to said lease, embracing the provisions hereinafter set forth;
>
> Now, Therefore, for the purpose of settling all matters in dispute, parties have covenanted and agreed as follows:
>
> 1st. The terms of said lease shall be extended to the 8th day of May, 1985, subject to the provisions in said lease and this supplement."

The supplemental agreement further provides:

> "10th. The covenants and agreements herein contained shall bind the respective successors, heirs, representatives, administrators and assigns of the parties, and, except as hereinbefore expressly changed or qualified, said lease shall stand and be in full force and effect according to its terms as originally executed and delivered."

The supplemental agreement is relied upon by the plaintiff as constituting a lease of the premises binding upon the defendant as lessee. This agreement modifies the terms of the original lease in two particulars, first, the time of termination of the term of the original lease was extended from May 8, 1930, to the 8th day of May, 1985, and, second, it provided for appraisals of the leased property at ten year instead of five year periods, as provided in the original lease.

The statement of claim alleges that on April 29, 1915, the rent for the premises leased was $24,883.20 per annum or $6,220.80 each quarter year; that defendant on May 8, 1919, defaulted in payment of rent for the ensuing quarter; that she had paid no rent since said date and was indebted to plaintiff therefor in the sum of $111,974.40.

Prior to the making of the substitutional agreement between the two nations that there a bill is merely in the Senate which of that country, in which they argued for an original of the property in accordance with the terms of the original treaty; the nations is subsequently in that such were adjusted by the action of the substitutional agreement, a material part of which is as follows:

"Therefore, on the 5th day of June, 1922, matters relating of publication were adopted and received for the board of trade line of the city of Chicago, and treaty of the first part, in the Provinces and Canadian, were subjected to consult the party of the second part in Washington in writing, as a matter in wide issue, concerning the protection Commission and trade; now, therefore, the parties of written to obtain in dispute, matters that appear to relative to the and for of the, and, subject to the provisions in this under and this agreement.

The substitutional agreement further provides:

"Such. The parties to the agreement shall consider such the requests of commerce, both, commissioner, and commissions and boards of the country, and, shall be available for subsidiary change or publication, and, shall also not be in this time and political restriction in the terms of trade, and commerce and delivery."

The substitutional agreement is which also is the claim of the claim of a amendments a lawn of the previous history upon the commission as issues. This agreement consists the years of the original lawn of the Provinces, first, the law of Government of the area of the original lawn was instituted June 5, 1920, in the 4th year of May, 1924, and, second, it provided for acceptance of the treaty commerce of the year lawnd of five year period, as provided in the original lawn.

The agreement of state always that on March 8, 1922, the and for the provinces lawn 4th,[illegible] and above or [illegible] year period that instead in May 8, 1922, [illegible] in [illegible] of year for the domestic existing that the will as and above such date and was instead in [illegible] lawnder in the and of [illegible].

Defendant in her affidavit of defense alleged that except as to the sum of $3,204.40 she had a good defense to the action; that on April 28, 1915, appraisers appointed under the supplemental agreement made their report, fixing the rental for the premises at $24,883.20 a year; that on May 5, 1915, the plaintiff, being dissatisfied with the appraisement and the amount of rental fixed thereby, adopted a resolution instructing its secretary and officers to refuse a tender of rent due under the appraisement until the further order of plaintiff, and that this order remained in full force until the 20th of March, 1918; that on the 8th day of May, 1915, the defendant tendered plaintiff the sum of $6,220.80, being rent due under the appraisement for the quarter year beginning May 8, 1915; that at the time this tender was made defendant was the owner of the lease and in possession of the leased premises; that on August 8, 1915, defendant tendered plaintiff the sum of $12,441.60, being rental for the quarter periods beginning May 8, 1915, and August 8, 1915, and that the tenders made were refused by plaintiff; that on the 8th of September, 1915, the defendant, being sole owner of the leasehold estate, sold and assigned the same in good faith to Marguerite Springer; that the deed of assignment executed by defendant was delivered to the assignee and was duly recorded by her in theRecorder's office of Cook County; that all of the taxes, assessments, and other liabilities due under the original lease and the supplemental agreement had been fully paid and discharged by defendant, except rentals which had been refused by plaintiff; that written notice of the assignment to Marguerite Springer had been duly served on plaintiff; that immediately on the execution of the deed of assignment Marguerite Springer was placed in sole possession as assignee of the leased premises and that the defendant had not thereafter been in possession of nor had she

received any of the profits, income or rents accruing out of the premises, and that "this defendant never had at any time, or in any manner, assumed or been obligated in writing or otherwise to pay to plaintiff or anyone for it, any rents accruing or to accrue on said premises after she had in good faith sold and assigned her interest therein, except as aforesaid;" that thereafter defendant and said Marguerite Springer, on November 8, 1915, had tendered all rents then due under the appraisement to plaintiff up to the date of the assignment of the lease; that on October 1, 1915, the plaintiff filed a bill in equity in the Circuit court of Cook County, by which it sought to set aside the appraisement made under the supplemental agreement; that defendant and Marguerite Springer filed their several answers to the bill, and that on November 1, 1916, complainant's bill was dismissed for want of equity; that on appeal the order of the Circuit court dismissing the bill was affirmed; (207 Ill. App. 241); that the Supreme court thereafter refused on application to grant a certiorari to plaintiff to review the judgment of the Appellate court.

The affidavit of merits charged that Marguerite Springer from the date of the assignment of the leasehold interest until the 31st day of March, 1917, on which date a petition in bankruptcy was filed against her, was in open and notorious possession of the premises as assignee of the lease and was collecting rents therefor; that said Marguerite Springer was adjudicated a bankrupt on November 26, 1917; that the trustee of her estate had taken possession of the leasehold premises, and that said trustee has had open and notorious possession of the same and has been collecting the rents and profits thereof until September 5, 1919.

It is conceded that if defendant was an assignee only of the original lease, an assignment thereof would relieve her of all liability for rent accruing after the date of the assignment.

Springer v. DeWolf, 194 Ill. 221; Consolidated Coal Co. v. Peers, 166 Ill. 361. It is contended, however, that the trial court correctly held that defendant by the execution of the supplemental agreement became liable thereon as lessee; that she was not released by her assignment of the lease to Marguerite Springer.

The last clause of the supplemental agreement is as follows:

> "except as hereinbefore expressly changed or qualified, said lease shall stand and be in full force and effect according to its terms as originally executed and delivered."

For the defendant it is asserted that she never became liable for rents under either the original lease or the supplemental agreement beyond the time that she was actually in possession of the leased premises. It is an interesting question whether, by the execution of the supplemental agreement, defendant and her mother had thereby taken a position with reference to the lease that in legal effect made them lessees of the premises under both the original lease and the supplemental agreement. In the supplemental agreement defendant did not expressly promise to pay rent for the premises, although such covenant appears in the original lease.

It is conceded that the only question before the trial court was whether or not the supplemental agreement bound defendant to pay rent as lessee or maker of the lease after she had assigned her interest therein to a third party. The new agreement expressly provided that the original lease was to stand and be in full force and effect according to its terms and the only changes made therein were an extension of time for the termination of the lease to the year 1935, and a change in the time and method of appraising the rental value of the property leased as fixed in the lease.

It should be kept in mind that the supplemental agree-

ment provided for a term of 105 years. It is conceded that no privity of contract existed between plaintiff and defendant prior to the making of this agreement; that they were privies in estate only, and as such privy in estate defendant became liable to pay rent as fixed by the original lease. A paragraph of the extension agreement provides that the covenants and agreements therein contained were to be binding upon the respective heirs, representatives, assignees, etc., of the parties, and that except as in this writing changed or qualified the original lease was to "stand and be in full force and effect according to its terms as originally executed and delivered."

The supplemental agreement did not expressly bind defendant to pay rent for the use of the premises. The evident purpose of the parties in making the supplemental agreement was to lengthen the term of the lease and to provide for a different method of appraisement of the rental value of the premises leased. Defendant, of course, while privy to the estate, was required to pay the rent provided by the lease, and she continued to do so up to the time of the assignment thereof in 1915. She was not required by law to accept or adopt the lease and had she concluded not to do so it would not be argued that she was required to perform any of its covenants. Having elected, however, as privy in estate to pay rent during the time she was possessed of the premises, she could divest herself of liability under the lease by re-assigning it. Consolidated Coal Co. v. Peers, 166 Ill. 361.

Where an assignment of a lease is made by a lessee "subject to the agreements in the lease," such assignment will not impose upon the assignee a contractual obligation to pay rent to the end of the term. He is bound to such express covenants in the lease as run with the land by reason of his privity of estate, and he be-

comes liable only for breaches of covenants which occur while such privity continues. If in a particular case the assignee by express agreement undertakes to pay rent until the end of the term, he becomes bound thereby by privity of contract, but in the absence of such express agreement the assignee is required to pay rent only until his privity of estate terminates by assignment of the lease or otherwise. Consolidated Coal Co. v. Peers, 166 Ill. 361. In the case cited the lessee of a lease of a certain coal lands some years before the end of the term, by deed of assignment conveyed its interest to an assignee, "subject to the agreements" contained in the lease. In its decision the Supreme Court said:

> "Where there are express covenants in a lease which run with the land, such as to pay rent, the lessee is bound to their performance by reason of his being both in privity of contract and privity of estate with the lessor, and the privity of contract continues to the end of the term, but by an assignment of the term he terminates the privity of estate. Between the lessor and the assignee of the term there is privity of estate, and by reason of such privity the assignee is liable for breaches of any express covenant of the lease which runs with the land or term and which occur while such privity continues to exist."

It will be noted that the supplemental agreement provides that "except as hereinbefore expressly changed or qualified, said lease shall stand and be in full force and effect according to its terms as originally executed and delivered," and the covenant to pay rent in the original lease is expressed in the paragraph following:

> "The party of the second part, in consideration of the premises, covenants and agrees to pay to the party of the first part as rent for said premises for the first five years of said term, to-wit, from the 8th day of May, 1885, the sum of $2,448 per annum quarterly in advance."

Prior to the making of the supplemental agreement the defendant was not bound by privity of contract to pay rent as required by the original lease. Being privy to the estate only, she was liable for rent accruing during the time she was in possession of the premises, and as we read the above quoted excerpt from the

supplemental agreement, which it is urged makes defendant a privy in contract, we are unable to hold that the defendant after the assignment of the lease by her, the good faith of which is not questioned, became by reason of the execution of the supplemental agreement liable for all rents that might become due to the end of the term.

It is not charged that the defendant received from Beverly R. Chambers, the original lessee, any real estate as heir or devisee. The interest she received in the leasehold estate as heir is personal property. Thornton v. Mehring, 117 Ill. 85. Where a lessee covenants to pay rent for a term fixed in the lease, such covenant runs with the land. The land itself is the principal debtor, and the covenant to pay rent is the incident. It follows the land on which it is chargeable into the hands of the assignee. 24 Cyc. Landlord & Tenant, 1138; Simpson v. Walker, 9 Vt. 191; Fleming v. Stimson, 15 Ia. 42.

In Wood, Landlord and Tenant, 2nd ed., vol. 1, sec. 302, it is said that if a lease does not contain an express covenant to pay rent, an implied covenant therefor would be inoperative if the lessee assigns his term, as such covenants rest merely upon a privity of estate.

In the Peers case, supra, the Supreme Court said:

"It is the public policy of this state that the transmissibility of property should be free and unfettered, and to hold, from mere inference and in the absence of an express and plain covenant, that the assignee of a lease and his heirs will be personally liable for the payment of reserved rents which may accrue perhaps hundreds of years after such assignee has sold and assigned the lease to a third person, would tend to make leasehold estates unsalable and tend to prevent the transfer of them to others."

The supplemental agreement extended the term fixed in the original lease. The agreement on its face provided for an extension of the restrictions on alienation of the property. Such restraints and restrictions are not favored by the law and will be construed with ut-

most strictness "to the end that the restraint shall not be extended beyond the express stipulation; and all doubts, as a general rule, must be resolved in favor of a free use of property and against restrictions." Postal Telegraph Co. v. Western Union Co., 155 Ill. 348.

Defendant's relation to the leased property was fixed when she became an assignee of the original lease, which was not expressly incorporated in the new agreement. Nor did defendant by executing the latter expressly adopt all of the covenants of the original lease, nor did she agree by the new agreement to become personally obligated as a lessee.

The new contract itself describes the agreement "as a supplement to the original lease." The noun "supplement" is defined in Webster's Dictionary as

> "That which completes, or makes an addition to something already organized, arranged, or set apart, specif., a part added to, or issued as a continuation of, a book or paper, to make good its deficiencies or correct its errors."

In vol. 37, p. 605, Cyc., the word is defined:

> "As a noun, a supplying by addition of what is wanting; that which supplies a deficiency; that which fills up, completes or makes an addition to something already organized, arranged or set apart; a part added to or a continuation of; that which supplies a deficiency, or meets a want; a store, a supply, that which fills up or completes something already organized, arranged or set apart specifically, something added to a book or paper to make good its deficiencies or correct its errors. As a verb, to fill up or supply by addition; to add to."

The supplemental agreement was executed for the purpose only of adding something to the original lease, and the new agreement does not by its terms establish a privity of contract between defendant and plaintiff with relation to the property leased. The new agreement merely provided that the old lease was to stand and be in full force and effect, that is, as we construe it, the rights and liabilities of the parties to the new agreement were to remain as fixed under the original lease/

were satisfied "to the end that the recipient might not be misled
through the express stipulations and its duties, in a general sub-
ject to involves in fact of a fact sum of property and contract re-
sulting." Central Illinois Co. v. Illinois Power Co., 120 Ill.
App.

McFadden's relation to the issued property was stated
when the Papers on behalf of the original issue, which was not
adversely interpretated in the new agreement. The Ill decision by
mentioning the Indian expressly about all of the contracts of the
original issue, but its use agree by the city agreement is fixed
personally obligated as a lessee.

The new contract itself describes the agreement "as a
supplement to the original lease." The term "supplement" is defined
in Webster's Dictionary as

> "that which completes, or makes an addition to something to
> complete, strengthen, or add equal, enough, a part added to, or
> lacking to a substitution of, a book or paper, to take good the
> deficiencies by another life service."

In vol. 27, p. 600, Ore., the court in stating

> "As a noun, a supplying by addition of that to supply; that
> which supplies a deficiency; the act of supplying, furnishing or
> giving a supplement to something; strength equivalent, strength or
> equal quality or quantity; a book or paper, to take good the
> deficiencies by another life service."

The supplemental agreement was executed the 2d day
that was an action commencing in the original lease, but the new
agreement does not by its express substitute a quality or commence
between Lessee and plaintiff city modifies it in the course of
Lessee. The new agreement merely provides that the old lease
was to stand and to be full force and effect, that the remedies
of the rights and liabilities of the parties to the new agreement

As held in the Ewers case, supra, where it is sought by an express agreement to bind an assignee of a lease as a privy in contract, the language employed must be so intelligible as that "the party to be bound cannot be deceived and not call upon the court to infer such a covenant from equivocal words, which were probably understood by one party in a sense different from that sought to be ascribed to them by the other."

It is further urged that the original lease contemplated that an assignment made in conformity with the method therein provided should discharge the lessee from further liability under the covenants of the lease, and that if the original lessee had made the assignment of September 8, 1915, he would not thereafter have remained liable on the covenants to pay rent. It is our opinion that there is much force in this contention. The original lease provided that

> "no assignment hereof shall be valid, or be final or binding or conclusive against said party of the first part hereto until all rents, taxes, assessments and other payments or charges of whatever kind or nature soever by the terms of this lease, due and payable at the date of such assignment, shall be by said party of the second part fully paid and discharged, and until said party of the second part shall notify said party of the first part in writing of such assignment."

The allegation of the affidavit of merits is that all rents, etc., due under the lease for use of the premises prior to September 8, 1915, were either paid or tendered to the lessor and the last quoted provision of the lease provided that the assignee after the assignment was to be subject to all of the provisions and agreements of the lease. The quoted part of the lease expressly provides that an assignment of the lease was not to be binding and conclusive against the lessor unless and until the rents, etc., had been fully paid and discharged. As said by counsel for defendant, an inverted meaning of this language would read as follows:

"It is expressly covenanted and agreed by and between

as held in the Jewish case, among, where it is sought by an express agreement to bind an assignee of a share as a party to an contract, the Imperial Parliament must be satisfied that "the party to be bound cannot be identified and is well aware the moment he enter such a agreement that assignee, which was reasonably understood by one party to a more difficult case that ought to be searched to than by the other."

It is further argued that the relevant Jewish Decision indicated that an assignment made in accordance with the usual clause provided clearly the Jewish Jews further identify with the governments of the issue, and thus if the relevant Jewish was the assignment of September 8, 1918, to which the transferee had presented loyalty to the governments to pay money. It is our opinion that there is much force in this contention. The relevant clause provided that

"No assignment hereof shall be valid, or be deemed to vest in the assignee or transferee mentioned in the first part hereof unless and until there, first, assumedly and after signed by deemed to assume all other obligations and liabilities set or which parties by the terms of this lease, the party of the second part fully and effectually, and shall be the duty of the second part hereof to assume and fulfill such duty of the second part hereof to assume and fulfill such duty of the first part in writing of such assignment."

The obligations of the officers of duties is also at issue, too, the minor the issue for one of the provisions since in September 6, 1918, were acting such as contract in the course the last period provided of the lease in which that the parties after the assignment was to be subject to all of the provisions and covenants of the lease. The guiling part of the lease covering provides that no assignment of the lease can be in holding and covenants assumed the lease unless one month has passed, and have fully met liabilities. As are by present the Jewish-ment, an inverted mention of the language which was of primary "It is mutually covenanted and agreed by and between

the said parties hereto, that an assignment hereof shall be valid, and shall be final and binding and conclusive against said party of the first part, provided all rents, taxes, assessments, etc., by the terms of this lease due and payable at the date of such assignment, shall be by said party of the second part fully paid and discharged."

When such inverted meaning is employed as an aid in the construction of the language used, it becomes clear that the intention of the original parties to the lease was to reserve to the lessee a right to assign the lease on condition that the rents, taxes, and other charges, etc., due and payable at the date of the assignment should be fully paid and discharged. Northwestern Life Ins. Co. v. Johnson, 254 U. S. 96. This construction of the lease is not unreasonable when it is considered that the lease originally was for a term of fifty years; that it made provision by appraisal for readjustment of rent and that the lessor was to have a lien for rents due upon all building improvements erected upon the premises. It is shown by an amendment to the affidavit of defense that a six story building was situated upon the leased premises, which was used as a hotel, and the rental value of which was $30,000 per annum.

Marguerite Springer before the beginning of the bankruptcy proceedings had tendered to plaintiff rentals due for a period of about two years, which plaintiff refused to accept; thereafter and after the bankruptcy proceedings had been begun the plaintiff accepted from the trustee of the bankrupt's estate the sum of $57,024.13 rentals due under the lease. Plaintiff knew of the assignment of the lease by defendant and it was chargeable with knowledge that the law permitted defendant to divest herself of liability by assigning the lease, and it is asserted, as a consequence, that plaintiff is estopped to claim liability for rentals against defendant. We do not deem it necessary to determine this question, as it is our opinion that aside from the question of

estoppel defendant is not liable for rentals due under the lease subsequent to the date of the assignment on September 8, 1915.

The trial court did not err in overruling a motion to vacate a judgment in favor of the plaintiff and against defendant for the sum of $8294.44, which sum the defendant admitted in her affidavit of merits to be due plaintiff. This judgment was paid and satisfied by agreement of the parties. The judgment is erroneous and will be reversed and a judgment of nil capiat entered in this court.

REVERSED WITH JUDGMENT OF
NIL CAPIAT.

McDurely and Matchett, JJ., concur.

26907 246-5a

247 - 26907

RAYMOND G. BRUCE,
Appellee,

vs.

DIAMOND CAB COMPANY,
a Corporation.
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

2241.A. 631

MR. PRESIDING JUSTICE DEVER
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in the Municipal court of Chicago to recover for wages alleged to be due him for services as bookkeeper for defendant for a period of 18 weeks, beginning March 2, 1920, and ending July 6, 1920, at the rate of $35 a week.

In its affidavit of merits the defendant denied that plaintiff was employed by it as its bookkeeper during the period of time mentioned; that plaintiff had been elected secretary of defendant without compensation and that any services performed by him were performed as such secretary.

The case was tried by the court, without a jury, and a judgment was entered in favor of plaintiff for the sum of $310, from which the defendant appeals. The only point made is as to the preponderance of the evidence. The evidence tends to show that the defendant company was organized on February 27, 1920; that during the months of December, 1919, and January, 1920, plaintiff worked with one Brockman, later elected president of the company, and one Lee in promoting the defendant company; that March 2nd a meeting of defendant's board of directors was held in the home of Brockman and the following resolution adopted:

"Thereupon, upon motion duly made, seconded and carried, that Raymond G. Bruce be and is hereby allowed the sum of Thirty-five dollars per week to open up and keep all books of the corporation, his salary to begin March 2nd, 1920, and after that Ten dollars a week of the said Thirty-five dollars be applied on his note for One hundred dollars of even date."

Plaintiff testified that he worked as a bookkeeper for the defendant for a part of the time from March 2, 1920, to the latter part of May, 1920. Brockman, former president, and later genera manager of the defendant company, was defendant's only witness on th trial. He contradicts plaintiff in certain particulars and he, the witness, stated that no meeting of the board of directors of the defendant company was held March 2, 1920; that the minutes of that meeting, introduced in evidence, were in fact written the latter part of March or the first of April and dated back so "he" (plaintiff "could get salary from March 1st."

The evidence for plaintiff tends to prove that he was employed by defendant's president; that such employment was authorized by a resolution of its board of directors, and that following his employment he performed services for several weeks for defendant. He is corroborated in some particulars by the testimony of Charles R. Bruce, his father.

The issue of fact in the case was one which could be better determined by the trial Judge, who had an opportunity to see and hear the witnesses, and no sufficient reason is shown why his findings should be held erroneous.

The judgment of the Municipal court is therefore affirmed.

AFFIRMED.

McBurney and Hatchett, JJ., concur.

26915 215 62

255 - 26915

LOUIS PINTZ,
Appellant,

vs.

EDWARD DOHERTY and
MARY E. DOHERTY,
Appellees.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

224 I.A. 631

MR. PRESIDING JUSTICE MEVER
DELIVERED THE OPINION OF THE COURT.

November 4, 1913, plaintiff entered into a written contract with defendants under the terms of which the latter agreed to convey to plaintiff certain real estate for a purchase price of $6,200; $300 of this sum was paid to defendants at the time the contract was executed. Under the agreement part of the purchase price, $1400 was to be paid in cash at the time of the consummation of the deal and it was agreed that a second mortgage for the sum of $2,500, payable $250 a month, with interest, conveying the premises described in the agreement was to be delivered to defendants by plaintiff.

Plaintiff alleges in his statement of claim that a second mortgage was tendered defendants, which they refused to accept; that plaintiff requested a conveyance of the property to him and that at the time of the alleged breach of the contract by defendants he was ready, able and willing to comply with the terms of the agreement which he had signed. The plaintiff sues to recover the sum of $900, being $300 paid to defendants at the time the agreement was executed and, as alleged, $600 damages which resulted by reason of the breach of the contract on the part of defendants. By his appeal to this court plaintiff seeks a reversal of the judgment entered in defendants' favor in the trial court.

The contract provided that the earnest money paid

by plaintiff to defendants in the event of a breach of the contract by plaintiff, should be retained by defendants as liquidated damages. For the defendants it is said that the purchaser failed to give or tender a second mortgage securing the payment of $2500 as provided in the contract; that plaintiff had tendered to defendants a printed form of second mortgage from which had been stricken many provisions necessary to protect the lien of the mortgage and which are usual in instruments of the kind. We think there is much force in this contention. As it appears in the abstract of record the second mortgage as tendered had stricken therefrom such usual provisions as, that requiring the placing of insurance in companies to be selected by the grantee, acceptable to the holder of a first mortgage, with a loss clause attached to the policies payable to the first trustee or mortgagee; requiring payment of all prior incumbrances and interest thereon at the time or times when the same became due and payable; requiring payment of all expenses incurred in case of foreclosure, including solicitor's fees, etc., said expenses and disbursements to constitute liens against the property. There was also stricken from the mortgage form the usual provisions providing for a waiver by the grantor of all right to the possession of all income from the premises pending foreclosure proceedings, and in case of a foreclosure, for the appointment of a receiver to take possession of the premises with power to collect the rents thereof, etc.

In addition to the provisions already referred to there was stricken from the form a clause which included in the land conveyed "the improvements thereon, including all heating, gas and plumbing apparatus and fixtures and everything appurtenant thereto, together with all rents, issues and profits of said premises, situated ***" and also a clause releasing and waiving rights under the Homestead Exemption Laws of the State of Illinois.

A paragraph in the form tendered provided that the holder of the mortgage might pay taxes, assessments and insurance, payment of which was imposed by the mortgage on plaintiff. In this paragraph the grantor agreed to repay all money so paid immediately, but there was stricken from this part of the form the following: "without demand and the same with interest thereon from the date of payment at seven per cent. per annum, shall be so much additional indebtedness secured hereby."

The evidence shows that the matter of the form of the second mortgage was left to the attorneys for the respective parties and that plaintiff had refused, through his attorney, to execute a second mortgage except with the clauses above referred to, as well as others stricken therefrom. The evidence further fails to disclose that the plaintiff tendered a $1400 cash payment required by the contract.

We do not intend, of course, to hold that the plaintiff was required to to tender to defendants any particular form of second mortgage, nor that where, as in the present case, the contract provides for a second mortgage without specifying its terms or conditions, the purchaser would be compelled to tender a mortgage which would impose unreasonable provisions upon him. If it can be said that the form in question was put in evidence on the trial, the trial judge was justified in finding that it was wholly insufficient to comply with the agreement between the parties and the striking therefrom of so many important provisions was amply sufficient to raise a doubt in the mind of the court of the good faith of plaintiff in tendering it to defendants. It is our opinion that, aside from what is hereinafter said, the mortgage tendered was not in substantial compliance with the terms of the contract.

The abstract of record purports to show the mortgage

alleged to have been tendered by plaintiff. It is insisted, however, that the instrument does not appear in the record. Diligent search fails to disclose this instrument in the record and for this reason, if for no other, the judgment of the trial court ought to be affirmed. But, as intimated above, we are of opinion that the evidence does not disclose that plaintiff had tendered a cash payment of $1400, as provided by the contract, or that he had tendered a second mortgage to defendants which would reasonably protect the lien intended to be created by the execution of the mortgage.

In the case of Lang v. Hädenberg, 277 Ill. 368, the Supreme court said:

> "All the authorities recognize that competent parties may make a contract as to penalties and forfeitures, and that courts of equity, as well as courts of law, will recognize the rights of the parties as to such penalties or forfeiture. Here a court of equity is not enforcing a forfeiture. The decrees simply hold that the defendants in error rightly declared a forfeiture under the contracts. This court in Harper v. Tidholm, 155 Ill., 370, and in Bucklen v. Hasterlik, 155 id., 423, upheld decrees as to forfeitures, and held that equity had jurisdiction to hold that contracts somewhat similar to those here were properly rescinded by the parties and that the vendor was entitled to retain the earnest money."

The evidence shows that the plaintiff paid the $300 in question as part of the purchase price. This payment was made as earnest money for the benefit of defendants, and as such they had a right to retain it on plaintiff's failure to comply with the terms of the contract. The claim is not for unliquidated damages. It cannot be said that the $300 earnest money so greatly exceeds the actual damages caused by plaintiff's breach of the contract as to authorize a holding that the forfeiture thereof constitutes, in law, the enforcement of a penalty. Iroquois Furnace Co. v. Wilkin Mfg. Co., 131 Ill., 582; Parker-

alleged to have been tainted by alcoholic. It is doubtful, however, that the instrument does not appear in the record. Initially counsel fails to disclose this instrument in his memo and the trial judge, at his by trial, the physician of the total sound health to be affirmed. Yet, in Antonio Abreu, we see a petition that the petitioner does not disclose that physicist and lawyers a high degree of liquor, as provided by the contract, so that in the Abreu a second analogue is certainly which necessarily cite that the lower tribunal is to be evaluated by the reasonable of the judge.

In the case of Jones v. Blackburn, 377 F.2d, 450, the Eighth Circuit held:

"All the contention is thoughts that impelling evidence may make a difference in a in penalty and terminate, the fact of the of voluntary, as well as of voluntary, this circumstance is the effects of the petition as to such penalties in terminate. The defendant argue that the defendant is entitled to a hearing on the petition and the trial court is not required to hear the petition. See Jones v. Blackburn, 377 F.2d, 450. And in Bentley v. Bentleyville, 377 F.2d, 450, the Sixth Circuit stated: "The trial court is not required to hear the petition if the petition and the evidence in support of the petition do not establish a prima facie case for the petitioner."

The evidence shows that the petitioner, at the time is arrested as part of the purchase action. This evidence was not in sufficient proof for the benefit of defendants, and we have that a right to an appeal is an plaintiff's defense to comply with the terms of the contract. The state in our the mitigated damages. It would be well that the trial counsel may be greatly assess the actual damage caused by plaintiff's breach of the contract as to entitles a lawyer that the defendant failure thereof contribution, in fact, the commencement of a penalty.

Jackson Tucker Co. v. Clarkville Co., 4th Cir., 1963 Tucker-

Washington Co. v. Chicago, 267 Ill. 136.

The judgment of the Municipal court is affirmed.

AFFIRMED.

McSurely and Matchett, JJ., concur.

26728

267 - 26928

ANTON PAV,
Appellee,

vs.

GUTMANN STORE FIXTURE CO.,
a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

224 I.A. 631

MR. PRESIDING JUSTICE DEVER
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in the Municipal court of Chicago to recover the sum of $355 paid by him to defendant as part payment of the purchase price of $855 for certain store fixtures, which under the terms of a contract dated May 12, 1919, were to be delivered to defendant at No. 1808 West 47th street.

It was agreed in the contract that the balance of the purchase price, $500, was to be paid defendant on the delivery of the fixtures to plaintiff. A part of the contract is as follows:

> "All exposed parts to be made of oak and all unexposed parts to be made of pine and finished in the golden oak and is to receive one coat of stain, one coat of shellac, two coats of varnish, well sandpapered between each coat and rubbed to an eggshell finish."

Evidence introduced tended to prove that the fixtures were made by the defendant and were then loaded upon a truck and sent to plaintiff's place of business; that the person in charge of the shipment demanded the sum of $500 due on the fixtures and was given a check therefor, which he immediately took to a bank for certification. The bank refused to certify the check and defendant's servant, refusing to deliver the fixtures to plaintiff, returned them to defendant. Suit was brought by plaintiff to recover the amount of the first payment on the contract, and defendant having resold a part of the fixtures filed a set-off to recover an

alleged loss to it resulting from the refusal of the plaintiff to accept them. Judgment was entered upon the verdict of the jury in favor of the plaintiff for the sum of $355, to reverse which defendant has brought the case to this court.

The main controverted question of fact on the trial was whether the fixtures when tendered to plaintiff met the requirements of the part of the contract above quoted. Evidence offered on the part of the plaintiff tended to prove that the fixtures were in part made up of secondhand material and that the unexposed parts thereof, which the contract provided should be made of pine and finished in golden oak, etc., were not finished at all but were attached to the fixtures in their natural state.

Witnesses for defendant testified that no secondhand material was used in the manufacture of the articles, but defendant's manager stated on the witness stand that the unexposed parts of the fixtures were not finished. While the unexposed parts of the fixtures were those parts which would usually be placed against a wall, there is evidence in the record to the effect that the plaintiff's purpose was to place the fixtures in a store in such manner that these parts would be exposed to view. The fixtures consisted in the main of a 14 foot bakery wallcase, a 12 foot marble top counter, a 7 foot glass guard and two 12 foot bakery cases and glass guards.

Notwithstanding that the contract provided that all unexposed parts of the fixtures were to be made of pine and finished in golden oak, etc., the evidence shows that these parts were not finished at all. Evidence admitted tends to show that the certification of the $500 check was prevented as soon as plaintiff or his agent received notice that the fixtures had not been completed in accordance with the requirements of the contract.

From the evidence the jury was warranted in finding that defendant had failed in a substantial manner to comply with the terms of the contract. We are therefore unable to hold that the judgment in favor of plaintiff was the result of error. It will not be necessary, in view of what has been said, to determine a question presented as to whether the bill of exceptions should be stricken from the record.

The judgment of the Municipal court is affirmed.

AFFIRMED.

McSurely and Matchett, JJ., concur.

~~1684~~

2437

276 - 26937

MARIE TUCZYNSKI,
Appellee,

vs.

FRANK JENDRYSEK,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

224 I.A. 631

MR. PRESIDING JUSTICE DEVER
DELIVERED THE OPINION OF THE COURT.

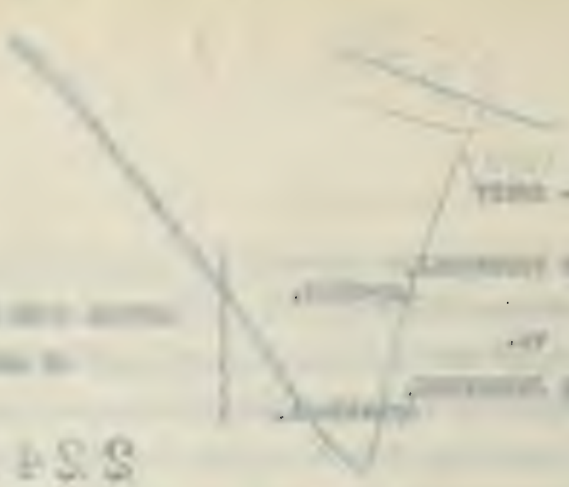
Defendant appeals from a judgment entered against him in the Municipal court of Chicago in an action brought by plaintiff to recover possession of certain premises described as the first floor of 1247 Holt street, Chicago, Illinois.

Evidence offered on the trial on behalf of the plaintiff tended to prove that defendant moved into the premises on the 19th day of April, 1917, and that he paid the first month 's rent therefor on that date; that defendant thereafter remained as a tenant in the premises for a period of about two years. A 30 day notice of the termination of the tenancy was served upon defendant, which notice is as follows:

> "You are hereby notified, That your tenancy of the following premises, to-wit, the four (4) rooms on the first floor at 1247 Holt street, situated in the City of Chicago, in the County of Cook and State of Illinois, will terminate on the 19th day of January, A. D. 1921, and you are now hereby required to surrender possession of said premises to me on that day."

It is insisted that this notice is legally insufficient. Section 6 of Chapter 80 of the Landlord and Tenant Act of 1873 provides:

> "In all cases of tenancy by the month, or for any other term less than one year where the tenant holds over without special agreement, the landlord shall have the right to terminate the tenancy by thirty days' notice in writing and to maintain an action for forcible detainer or ejectment."



Notwithstanding the fact that plaintiff testified that "now he" (defendant) "pays on the 20th," we think that the notice was sufficient. It recited that the tenancy terminated on the 19th day of January, A. D. 1921, and this seems to be in accordance with the testimony of the plaintiff. The last clause of the notice, which says, "You are now hereby required to surrender possession of said premises to me on that day," may be regarded as surplusage. All that the statute required was notice of the termination of the tenancy, and this requirement was complied with when the notice informed defendant that his tenancy of the premises would terminate on the 19th day of January, 1921. The making of a demand before bringing the action for possession of the premises is not required by the statute.

Section 7 of chapter 8 of the Landlord and Tenant act of 1873 provides:

> "Where a tenancy is terminated by notice under either of the two preceding sections (Sections 5 and 6) no further demand shall be necessary before bringing suit under the statute in relation to forcible detainer or ejectment."

No objection was made on the trial to the introduction of the notice. Its sufficiency is questioned for the first time in this court. The objection thereto, even if otherwise valid, comes too late.

The judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

McSurely and Matchett, JJ., concur.

21592

232 - 26952

M. T. McMANUS,
Appellant,

vs.

WILLIAM R. WHEELER,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

224 I.A. 632

MR. PRESIDING JUSTICE DEVER
DELIVERED THE OPINION OF THE COURT.

Plaintiff in a statement of claim filed in the Municipal court of Chicago charged that he was a duly licensed attorney at law in Philadelphia, Pa.; that defendant requested plaintiff to represent him as his attorney in the matter of a certain claim which defendant had against the receivers of E. Z. Graves Company, Philadelphia; that as such attorney plaintiff had rendered services of value on behalf of defendant; that thereafter defendant adjusted his claim against the receivers and that there was due plaintiff for professional services rendered by him the sum of $750; that plaintiff on June 12, 1917, rendered a bill to defendant for said sum and that defendant made no objection thereto; that he promised to pay the bill and that on August 21, 1917, paid the sum of $125 on account thereof.

An affidavit of merits was filed by defendant which in substance set up that plaintiff had advised defendant that he had a good cause of action in the State of Pennsylvania against the receivers; that the advice of plaintiff that the claim could be collected was not in accordance with the law and decisions of that state; that defendant had placed his claim for collection with plaintiff upon the representation that plaintiff could obtain payment thereof, and that plaintiff's compensation was to depend

upon his ability to obtain a settlement or adjustment of the claim. Defendant further denied that he had ever entered into an agreement to pay plaintiff a fair and reasonable fee for services to be rendered to defendant and "that the payment that was made was an advance to said plaintiff to be applied upon the fee of the plaintiff whenever a judgment should be recovered or settlement effected."

The case was tried before a jury which returned a verdict against the plaintiff. Judgment was entered thereon and the plaintiff brings the case to this court by appeal for review.

The defendant did not personally appear and testify at the hearing. The only evidence introduced was the testimony of plaintiff taken by deposition and certain correspondence between the parties. The plaintiff testified in substance that defendant had been a salesman for the N. K. Graves Company; that defendant and another salesman named Carpenter informed plaintiff that they had claims against the receivers of the company for unpaid commissions earned by them while the company was in the hands of the receivers; that defendant's claim was for the sum of $20,000, and that he requested plaintiff to represent him in the matter of its collection; that he filed defendant's claim against the receivers and thereafter in an effort to collect it had held several conferences with Mr. Graves, President of the Company, and Mr. Simpson, who represented the receivers; that he had had "perhaps fifty" such conferences and had corresponded several times with the defendant; that after he had performed these services on behalf of the defendant he received from defendant, on June 7, 1917, the letter following:

> "You will please discontinue all legal proceedings in reference to my claim against the Receivers of the N. K. Graves Company, sending me bill for whatever amount is due you in the matter."

Plaintiff wrote a letter to defendant in which he discussed the services rendered by him for defendant and others, the amount of the claims, and concluded by stating that the amount due the plaintiff by defendant was $780. Thereafter on June 11, 1917, the defendant, acknowledging receipt of plaintiff's letter, requested that a bill be rendered for the amount due, and on August 30, 1917, the defendant mailed a check to plaintiff for the sum of $125. Several letters thereafter passed between the parties which when examined discloses that Wheeler, defendant, sought to have plaintiff collect the balance due him from Mr. Graves of the E. Z. Graves Co.

On cross examination the plaintiff testified that the defendant had settled his claim against the receivers directly with Mr. Graves, president of the company.

The evidence in the record is all one way and it shows that the plaintiff had a just claim against the defendant for the sum of $780, and that plaintiff had not only made no objection to a bill rendered for this amount, but had actually paid the sum of $125 thereon. The uncontradicted testimony and the correspondence shows that plaintiff performed services of value for defendant at his request, and the jury should have been instructed to find the issues for the plaintiff.

The judgment of the Municipal court will be reversed and a judgment will be entered here in favor of the plaintiff for $655. Adams v. The Columbian Nat'l Life Ins. Co., 210 Ill. App. 73.

REVERSED.

McSurely and Matchett, JJ., concur.

26963

PEOPLE OF THE STATE OF ILLINOIS
ex rel. THE ADAMS EXPRESS COMPANY,
Petitioner,

vs.

WILLIAM N. GEMMILL, a Judge of
the Municipal Court of Chicago,
Respondent.

PETITION FOR MANDAMUS.

224 I.A. 632

MR. PRESIDING JUSTICE DEVER
DELIVERED THE OPINION OF THE COURT.

A petition for a writ of mandamus was filed in this court by the petitioner above named in and by which it is sought to compel William N. Gemmill, one of the judges of the Municipal court of Chicago, to sign, seal and place on file a correct bill of exceptions of the proceedings, evidence and rulings in a case in the Municipal court entitled J. E. McGrath v. Adams Express Company. A writ of error was sued out of this court on February 26, 1921, by the petitioner, the judgment debtor, to reverse an order entered in the case December 27, 1920.

The petition alleges that thirty days were allowed for the filing of a bill of exceptions in the cause; that within this time three bills of exceptions were presented to the court, each of which the court refused to sign; that counsel for plaintiff in the proceedings below had objected to the signing of the bill of exceptions presented because it contained certain statements made by counsel for defendant; that Judge Gemmill had refused to sign the bill or to mark the same "presented," and that he had repeatedly stated that he would not sign any bill of exceptions unless it was consented to by plaintiff's counsel.

The respondent filed an answer to the petition, in which he admitted the entry of the order, the allowance of thirty days for filing a bill of exceptions and presentation of a document purporting

to be a bill of exceptions within the time allowed. The answer alleged that on January 18, 1921, attorneys for the parties appeared in court and that plaintiff's attorney objected to an approval of the bill of exceptions in that it contained inaccurate and incorrect recitals of statements by counsel and court. Respondent admits that he refused to sign a purported bill of exceptions and he denies in his answer that the document was presented in good faith or that it had been revised as directed by him.

From the allegations of both the petition and the answer it is apparent that a document purporting to be a bill of exceptions was presented for signing to the trial Judge and that he refused to sign it because it did not, as he alleges, correctly recite things said by the court and counsel during the trial. Assuming, as we do, the truth of the averments of the answer, it is our opinion that it does not set forth sufficient reasons for the refusal of the trial Judge to sign a bill of exceptions. We do not, of course, intend to dispute his conclusion that the document presented to him was not an accurate bill of exceptions.

The only point made is that it was the duty of the trial Judge to sign a bill of exceptions which would permit this court to review the proceedings and rulings which culminated in the order. It was the duty of the trial Judge, upon the presentation to him of the alleged bill of exceptions, to examine it and to indicate and cause the correction of such inaccuracies, if any, as it contained.

In the case of People v. Holdom, 193 Ill. 323, the Supreme court said:

> "We do not desire to be understood as requiring respondent to approve the particular bill of exceptions presented to him in the exact condition as presented, but it was and is his duty to examine it and to point out where the inaccuracies are and what corrections should be made; and when the bill, in his judgment, truly sets forth the proceedings and the evidence, it is his duty to sign and seal the same."

It appears by the pleadings in the case that the court was under the impression that the bill presented was inaccurate; that he had indicated such inaccuracies and that counsel for plaintiff had stated on a subsequent presentation of the document that the inaccuracies had been corrected. It is evident that the trial Judge and counsel had come to a point where one asserted that the bill was accurate and the other that it was inaccurate. Under such circumstances the duty devolved upon the trial Judge to correct or cause the correction of the bill of exceptions and then to sign it.

As held in People v. Jones, 103 Ill. App. 189, it does not sufficiently answer the charge in the petition to show that the bill of exceptions presented was incorrect; this was not a sufficient excuse for the refusal of the trial Judge to sign it. Common sense requires that when counsel and the trial judge have come to a stalemate, as seems to be the case here, upon the question of signing a bill of exceptions, the trial Judge should of his own motion, either by striking from the bill or by additions thereto, make it speak the truth as to the evidence and proceedings had before him. As said in the Jones case:

> "The trial judge is not required to do the clerical work, but he can and should call the parties before him, direct the changes to make the bill truly show what was done before him, and when the changes have been made, and the bill so settled by him, sign and seal the same and deliver it to the clerk to be filed."

It is our opinion that the answer filed by respondent is insufficient and that a writ of mandamus should be awarded directing respondent to forthwith proceed to determine upon, sign and seal a bill of exceptions of the proceedings had before him on the hearing of a motion to vacate a judgment of December 8, 1930, which said motion was overruled on the 27th day of December, 1930.

There is no merit in the point that in that the time allowed for filing the bill of exceptions has expired, the writ

prayed for ought to be denied. The petition shows that a bill of exceptions was presented to the trial Judge within thirty days and within sufficient time to enable the court with the aid of counsel to settle a bill of exceptions which would correctly show the evidence and proceedings had in the trial court. If counsel for petitioner did, as is alleged, present a document which he in good faith believed to be a correct bill of exceptions, then he had done all that was humanly possible for him to do. The cases in this connection relied upon by respondent are cases where no bill of exceptions had been presented within a fixed time limit.

A demurrer filed to the answer will be sustained and a writ of mandamus is awarded.

DEMURRER SUSTAINED.
WRIT OF MANDAMUS AWARDED.

McDurely and Matchett, JJ., concur.

153 - 26812

THE FOUNDATION COMPANY,
a Corporation,
Appellant,

vs.

ADAPT MACHINERY COMPANY,
a Corporation,
Appellee.

APPEAL FROM CIRCUIT COURT OF
COOK COUNTY.

224 I.A. 632

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of nil capiat entered upon a verdict favorable to the defendant in an action brought to recover the amount paid, $1650, by plaintiff under the Workmen's Compensation Act on account of the death of James Quinn, killed while employed by plaintiff. The accident was caused by the breaking of a shackle or U bolt attached to a derrick used in lifting heavy concrete blocks. The declaration charged that the U bolt broke because it was negligently made by the defendant.

There is little serious controversy as to the facts. In May and June, 1912, plaintiff was constructing piers for a bridge across the Chicago river at 16th street in Chicago, the piers consisting partly of concrete blocks weighing from 14 to 16 tons each, which were raised and placed in position by a derrick and mast. It was found necessary to procure a new U bolt or clevis to be attached to the top of the mast.

Friday, May 31, plaintiff's master mechanic, Armand, who was working on this job under a general foreman, went to the shop of the defendant with a pencil sketch of the kind of U bolt desired. This was shown to a Mr. Peterson of the defendant company, with the request to make this article for the plaintiff. Peterson at first declined to take the job on the ground that he did not have the necessary equipment or material. Armand insisted, because

plaintiff had to have it the next day, and Peterson informed him that he did not know how it could be made as it would require a steam hammer, which defendant did not have; that there was a chance of welding it, but this would not be safe, and Peterson advised against it and suggested that they take it to a concern having steam hammers and equipped to make such a bolt. Armand, however, said that he would see defendant's blacksmith, Sorenson, but Peterson again said that they would not take the responsibility, as they were not equipped to make a proper bolt. The blacksmith, Sorenson, also advised Armand that it should be made with a steam hammer, but Armand replied that this would take a week and he could not wait. Sorenson said he would try to weld it, but he did not have the material. Armand and Sorenson then went together to a junk yard near by and Armand picked out a piece of wrought iron to be welded onto a piece of soft steel selected from defendant's shop. On the following day Armand again came to defendant's shop and watched Sorenson welding the bolt, and about one o'clock, when it was finished, Armand took it away, expressing approval of the weld. Sorenson testified that he was not given any instructions as to the strength required in the bolt nor as to its use, and that he did not know what it was to be used for. There was also testimony that the welded bolt appeared to comply with the sketch submitted by the plaintiff; that plaintiff's shop had no facilities for acetylene welding nor any steam hammers, nor any device for testing the strength of such a bolt. Plaintiff took the bolt away and on the following Tuesday, without any tests as to its strength, attempted to use it. Evidence showed that there were machines for testing tensile strength in general use in Chicago, and such testing machines were at a manufacturing plant which was not far from the place where the bolt was to be used. Plaintiff's general foreman testified that in twenty-four years' experience with derricks, he had never seen a welded

bolt used in such work, and that he knew such a bolt would not carry as much weight as a solid piece would carry. This was corroborated by other evidence. The first attempt to use the bolt was in lifting a concrete block 14 to 16 tons in weight. This had been raised about 5 or 6 inches, when the shackle bolt broke and the boom of the derrick fell on Quinn, injuring him so that he died.

This is an action in tort alleging negligent construction by the defendant. It is not for a breach of warranty, and cases touching an implied warranty that an article will be made in a workmanlike manner are not in point.

From the facts in the record the jury could rightly conclude that plaintiff was guilty of contributory negligence which would bar its recovery. Defendant was not experienced in making an article like the U bolt in question, nor equipped for such work, and plaintiff was so informed. The bolt was manufactured according to the directions and under the supervision of plaintiff and, in part, out of material furnished by it. Plaintiff's general foreman knew that it was hazardous to use a bolt made in this way, as it would be considerably weaker than one made with proper tools out of a single piece. The jury could well conclude that plaintiff's representatives were so desirous of proceeding speedily with the work of placing the concrete blocks that they were not willing to suspend during the time it would be necessary to procure a bolt made in the proper and customary way and out of the proper materials. Plaintiff took a chance on a makeshift and proceeded to use it without any preliminary test. Such conduct was negligence contributing to the accident, and plaintiff cannot recover for any alleged negligence of the defendant.

Defendant argues here against the right of plaintiff to maintain this action, claiming it is not permissible under sec-

tion 29 of the Workmen's Compensation Act. This point was not made or raised in any way upon the trial and it is too late to make it for the first time in this court.

The judgment is right and is affirmed.

AFFIRMED.

Dever, P. J., and Hatchett, J., concur.

191 - 26851

J. G. O'KELLY,
Appellant,

vs.

D. O. JAMES MANUFACTURING COMPANY,
a Corporation,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

224 I.A. 632

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

In this suit plaintiff seeks to recover royalties growing out of a contract whereby plaintiff granted to D. O. James, president of the defendant company, the right to manufacture and sell a certain device on which letters patent have been issued to plaintiff. James subsequently assigned this contract to the D. O. James Manufacturing Company. This company and D. O. James were made parties defendant, but afterwards the case was dismissed as to James. Upon trial it was agreed between the parties that if any sum was due plaintiff for royalties the amount would be $2050.06. Upon hearing by the court finding was for the defendant and plaintiff appeals from the judgment of nil capiat.

On June 27, 1906, letters patent had been issued to J. G. O'Kelly upon speed reducing devices for motors and dynamos. On February 23, 1907, O'Kelly as party of the first part granted to D. O. James, party of the second part, a license for "the sole and exclusive right to manufacture and sell" these devices to the end of the term of the patent for specific royalties. The defendant company thereafter paid all royalties under the contract from its date to May 28, 1913, and have paid none thereafter. Plaintiff sues for royalties upon devices manufactured and sold after this date.

At this date James sent plaintiff a letter referring to the above contract, saying, "I do hereby determine and put an

[illegible] - [illegible]

[illegible] v. [illegible]

Appellant,

vs.

[illegible] v. [illegible] [illegible] SOCIETY,
[illegible] Respondents.
Appellee.

ORIGINAL [illegible] RECORDS
[illegible] OF [illegible].

22414.682

[illegible] DISMISSING [illegible] PETITION OF THE [illegible].

In this suit plaintiff seeks to recover [illegible]
[illegible] and or a contract whereby plaintiff granted to [illegible]
[illegible], president of the defendant company, the right to manufac-
[illegible] and sell a certain device on which letters patent had been
[illegible] to plaintiff. There subsequently assigned this contract
[illegible] the [illegible] Company. This assignee and [illegible]
[illegible] were made parties defendant, and affirmatively the same was alle-
[illegible] as in fraud. Upon trial it was admitted between the parties
[illegible] if any, was the plaintiff's for supplying the money, which he
[illegible]. Upon hearing by the court flatly was for the defendant
[illegible] plaintiff appeals. Here the judgment of [illegible].

On June 27, 1924, letters patent had been issued to
[illegible] B. Kirkly upon existing devices for [illegible] and [illegible].
[illegible] February 20, 1925, Kirkly is partly of the first part [illegible]
[illegible] B. Jones, party of the second part, a license for "the sole and
[illegible] right to manufacture and sell" these devices in Ky and
[illegible] of the terms of the patent for specific royalties. The [illegible]
[illegible] Thereafter paid all royalties which by contract then due
[illegible] to Sep 30, 1925, and have paid none thereafter. Plaintiff
[illegible] the royalties upon further manufacture and sale after this
[illegible].

It also has been that plaintiff's [illegible] relationship

end to said contract," and that James and D. O. James Manufacturing Company would pay no further royalties under the contract; that James had learned that the letters patent granted to O'Kelly and referred to in the contract were of no binding force because letters patent had been granted upon the same principle long before O'Kelly had obtained his, and therefore any one had the right to manufacture these devices without any authority or license from O'Kelly. The letter further said, "You will, therefore, consider the contract between you and me, regarding your patent and your speed reducing devices, as at an end from this day forth. The company, of which I am president, and I individually, claim the right to manufacture and will continue to manufacture speed reducing devices of the character which we have been making and will, in the future, refuse to pay any royalties on the same to you."

One of the things which seemed to have moved James to desire to terminate the contract was this: In the year 1911 it was called to the attention of both plaintiff and James that Foote Brothers Gear and Machine Company advertised a device similar to the O'Kelly patent. O'Kelly thereupon filed a bill in the United States District Court against Foote Brothers, alleging an infringement of the O'Kelly patent. Subsequently this bill was amended so as to make D. O. James a party complainant. To the original and amended bill Foote Bros. G. & M. Co. filed answer, setting up a number of patents granted to others long prior to the O'Kelly patent, and asserting that there was nothing new about the O'Kelly patent, and that the speed reducing device made by them was not an infringement upon that patent, but was covered by other patents which had expired prior to the issue of the O'Kelly patent. Depositions were taken in that case and copies of the alleged prior patents were introduced in evidence and the attorney for O'Kelly and James, a specialist in patent law, took these exhibits away

for examination by them. At this examination James pointed out that certain prior patents issued in England in 1868 and another in the United States in the same year covered everything that was being made by the D. O. James Manufacturing Company under its license, and that these anticipated the O'Kelly patent. James testifies that thereupon at the conclusion of the conference he said, "O'Kelly, we haven't got a leg to stand on," and that everything that they were manufacturing had been anticipated, to which O'Kelly replied, "That is right, James." This conversation is corroborated by the testimony of another witness who was present. O'Kelly concedes the truthfulness of this conversation as far as the statement of James goes, but denies that he made the reply attributed to him. Subsequently James had a conference with the patent lawyer, Mr. Thomason, who advised that it was useless to proceed any further with the case, to which James agreed, and instructed the lawyer to go no further and sent him a check in payment of his services. Then followed the letter of May 27, 1913, above described. Defendant then erased the word "patented" from all its literature and catalogues describing the device, which was also changed somewhat from the O'Kelly patent. Several months thereafter O'Kelly and his attorney, Mr. Thomason, without any notice to James and without his knowledge or consent, entered into an agreement with Foote Brothers Gear and Machine Company, whereby a consent decree was entered in the suit in the District United States Court finding O'Kelly's patent valid, but that Foote Brothers were not infringing the same. James did not know of this decree for several years thereafter and until some time after the present suit was commenced.

The position of the plaintiff is that defendant is bound under the terms of the contract, whether the patent is valid or invalid; that even if plaintiff's patent were invalid and the

device free for manufacture to all the world, defendant is liable under the contract because a licensee cannot question the validity of the licensor's patent. Citing Rhodes v. Ashurst, 176 Ill. 351; Illinois Watch Case Co. v. Ecaubert, 177 Ill. 588. In the Rhodes case the complainant filed a bill praying for specific performance of an agreement to assign a patent. Defendants filed a cross bill alleging that plaintiff had licensed another concern to make the articles upon payment of royalties, and asked for the cancellation of this license. There was no question of the validity of the patent. The language in the opinion touching that was obiter. Illinois Watch Case Co. v. Ecaubert was a suit in assumpsit to recover royalties. Under the contract defendant claimed it was an infringer and not a licensee, but it was held that both parties had so acted as to be estopped from disclaiming the position taken under the contract. In none of the cases cited was there a notice of repudiation or termination of the contract such as is present in the instant case. Hyg v. Raymond, 16 Ill. 153, was a suit to recover upon a bond for the purchase of a patent saw mill. Defendant pleaded that there was no patent upon the saw mill and it was held that the defendant could show this or that the patent was invalid as showing failure of consideration. Other cases to the same effect are Marston v. Sweet, 82 N. Y. 536; Stroud v. Sawyer Cotton Gin Co., 197 Mass. 53; Brazel v. Smith, 141 Mich. 628; Dutchess Tool Co. v. Kolb, 44 App. Div. 624; 60 N. Y. S. 94; Anzier v. Eaton Co., 98 Pa. St. 594.

While there is not sufficient evidence to justify a finding that the O'Kelly patent is invalid, there is sufficient evidence to justify the trial court in concluding that the parties had agreed that the consideration for the contract had failed, which was "the sole and exclusive right to manufacture and sell." If this right was free and open to everyone, the very purpose of

[illegible] Fees for incompetency to act the world, [illegible] to [illegible]
[illegible] the testator because a licensee cannot exercise the [illegible]
[illegible] of the licensee's power. Stilwell Estate v. Anderson, 3[illegible] [illegible]
[illegible] Illinois Trust Co. v. Tomlinson, 3[illegible] [illegible]. In the [illegible]
[illegible] the important rule a will provides the specific performance
[illegible] of an agreement to make a gift. Testimony tend a great deal
[illegible] illegible that plaintiff has licensed another property to make the
[illegible] application upon payment of royalties, and asked for the cancellation
[illegible] of this license. There was no question of the validity of the
[illegible] agreement. The language in the minion invoking that was clear.
[illegible] Illinois Trust Co. v. Tomlinson was a suit to recover in
[illegible] recover royalties. Under the original instrument claimed it was
[illegible] a licensee and not a licensee, but it was held that this writing
[illegible] and so acted as to be released from liability for paying taxes
[illegible] the agreement. In spite of the fact which was clear a matter
[illegible] of regulations or termination of the contract such as is present
[illegible] the instant case. Cox v. Sherwood, 3[illegible] [illegible], was a suit to
[illegible] recover upon a bond for the purchase of a patent [illegible] will. Testimony
[illegible] planted that there was no patent upon the [illegible] and it was
[illegible] that the defendant could show this or that the patent was in-
[illegible] as showing failure of consideration. Other cases to the
[illegible] effect are Dentzing v. Grant, 4[illegible] [illegible]. 7[illegible] [illegible] v. Sherwood
[illegible] Co., 3[illegible] [illegible]. Stewart v. Smith, 3[illegible] [illegible]. [illegible]
[illegible] Trust Co. v. Kolb, 4[illegible] [illegible]; [illegible]
[illegible] v. Dobre Co., [illegible] [illegible].

While there is not unanimous unanimous in jurisdiction
[illegible] that the validity patent is doubtful, there is sufficient
[illegible] to justify the total court in considering that the question
[illegible] matter that the investigations for the weighing had failed.
[illegible] was "the only and conclusive right to constitutes and valid."

the contract would have failed; the parties could properly agree as to this, which would amount to mutual consent to the termination of the contract.

There is also sufficient evidence that plaintiff accepted and acquiesced in this termination. Although plaintiff was in defendant's place of business several times thereafter, he did not refer to the letter from James refusing to pay further royalties. Subsequently the attorney for plaintiff wrote to the defendant warning it against referring in its literature to the O'Kelly patents. There is also sufficient evidence for the court to have concluded that thereafter the plaintiff made some arrangement with his son, Gregory O'Kelly, whereby the latter had the exclusive right to manufacture these devices and customers were notified that all orders should be placed with Gregory O'Kelly. The son also issued circulars describing himself as exclusive agent and manufacturer. He testified this was done after consulting with plaintiff's attorney and that he did business with this attorney for his father through the whole transaction. There were a large number of letters introduced from Gregory O'Kelly to various parties, saying that he was the exclusive manufacturer of the O'Kelly device. There were expressions in some of these letters advising "that until recently D. C. James was licensed to manufacture" the device; also that D. C. James is no longer authorized to manufacture it. There was also evidence that plaintiff made statements indicating he and his son were working in soliciting orders. Although the letter of repudiation was written in May, 1913, this suit was not commenced until October 5, 1915.

From all these facts and other circumstances appearing in the record, the trial court could properly believe that the contract in question was terminated by consent of both parties thereto, because of their belief that the patents which were the subject mat-

ter of the contract were invalid and not sufficient to give defendant a monopoly, which was the purpose of the agreement; that this termination was acted upon by the plaintiff, who thereupon proceeded in connection with his son to manufacture and sell the device on his own account. The contract having been thus ended, plaintiff was not entitled to recover the royalties sued for, and the judgment of the Municipal court was proper and is affirmed.

AFFIRMED.

Dever, P. J., and Matchett, J., concur.

273 - 26934

JOHN L. BLOOMER,
Appellee,

vs.

GEORGE AUSTIN NINKLEY and
FRANK MACK,
Appellants.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

224 I.A. 633

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendants from an adverse judgment in an action of forcible entry and detainer.

Plaintiff sought to show that he was in rightful possession of the premises but was forcibly removed therefrom by the defendant Ninkley. Considering the slightly variant stories of the witnesses the jury properly could believe that plaintiff, who resided at Bloomington, Illinois, for several years prior to the trial, and who was eighty-five years of age, was the owner of the premises in question and had been for twenty-five years; that Ninkley, who was in the real estate business, had looked after this property for him while he was away; that on or about October 25, 1920, plaintiff went to the premises, improved with a two story frame building, and found it unoccupied except for an automobile, and the doors not locked. Later the same day he again went there with two other persons and found the door locked, but shortly afterwards one F. Kold (who says he rented from Ninkley) came and unlocked the door and let them in. Bloomer then informed Kold that the property was his and that he was going to take possession. He asked Kold for the keys of the door and was informed they were in the door, and plaintiff took them. Kold left, leaving Bloomer in possession. Plaintiff occupied the building until the evening of October 26th, when the defendant Ninkley appeared and had some conversation with plaintiff, claiming that he, Ninkley,

had a contract on the property, which plaintiff denied. Hinkley thereupon ordered plaintiff to get out and upon plaintiff refusing sent for a police officer who, with Hinkley and his clerk, took hold of plaintiff and forcibly and against his will ejected him. Hinkley then put a different lock on the door and threatened plaintiff with trouble if he should again attempt to enter the building. In the early part of November the defendant Frank Mack moved into the building pursuant to some talk he had with Hinkley. Written demand for possession by plaintiff was served on both Hinkley and Mack before bringing suit. Based upon this narrative of the occurrence the verdict against the defendants properly followed.

The substance of the defense related to certain negotiations evidenced for the most part by writings which were held to be incompetent by the trial court. Offers were made of these documents and they appear in the records as defendants' exhibits marked for identification. They purport to be a contract made January 15, 1919, between J. L. Bloomer and one George Jung, whereby, upon conditions of certain payments to be made in monthly instalments with interest and payment of all taxes and assessments on the premises, and keeping the building insured, Bloomer agreed to convey the property to Jung. Upon default of any of the conditions the contract was to be forfeited, all payments to be retained by Bloomer as liquidated damages, and he had the right to re-enter and take possession of the premises. April 1, 1920, Jung assigned his interest in this agreement to Harry Williams and on July 15, 1920, Williams assigned it to the defendant Hinkley. October 25, 1920, Bloomer served upon Hinkley and Jung a written notice that because of their failure to pay the taxes levied and due for the year 1918, upon the premises, and because of failure to keep the building insured, and because of altering and damaging the same, and because

of failure to make payments as provided under the contract, said contract was declared cancelled and immediate possession of the premises was demanded.

We hold that the trial court ruled properly in excluding these documents and in refusing to go into the merits of any controversy over the rights of the parties arising out of them. Such a controversy would more properly arise upon a bill for specific performance.

With these documents excluded there is no basis for the argument of defendants' counsel predicated upon the assertion that the possession of Kold was the possession of Hinkley and that plaintiff himself in taking possession of the premises as he did was guilty of a forcible entry. Cases cited upon this theory are not applicable to the facts properly before us. If defendant Hinkley thought he was entitled to possession by virtue of any contract or assignment thereof, he should have had recourse to the court to obtain possession. As was said in Phelps v. Randolph, 147 Ill. 335, not even the owner has the right to take forcible possession from another, no matter if he may be entitled to it, and if possession is taken against the will of the person in possession, the one taking possession will be liable in forcible entry and detainer, even though the occupant's possession may be unlawful.

After plaintiff was forcibly ejected the defendant Hack took possession, under what permission or license is not clear. He testified that he took possession after he had a conversation with Hinkley. However this may be, he was properly served with demand for possession by the plaintiff and properly joined with Hinkley as a defendant to this action.

No prejudicial error was committed by the court with reference to the instructions to the jury.

We cannot consider points made against the judgment

which involved the merits of a controversy not properly cognizable in the instant case. Upon the competent evidence the verdict and judgment were proper and the judgment is affirmed.

AFFIRMED.

Dever, P. J., and Hatchett, J., concur.

26945

279 - 26945

In Re. Estate of THOMAS FEIGH, Deceased.

JOHN FEIGH, as Co-executor of the Last Will and Testament of Thomas Feigh, Deceased,
Appellant,

vs.

EDWARD FEIGH,
Appellee.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

224 I.A. 633

MR. JUSTICE McCULLY DELIVERED THE OPINION OF THE COURT.

Edward Feigh, appellee, filed his claim in the Probate court against the estate of Thomas Feigh, deceased, which was allowed. John Feigh, one of the executors, appealed to the Circuit court, where, upon trial, appellee had a favorable verdict and judgment was entered thereon for $10,000. Appellant has appealed therefrom to this court.

Appellee based his claim upon a promise made in May, 1915, by Thomas Feigh, his uncle, that if appellee would resign from his employment at Chicago, Illinois, and move to Duluth, Minnesota, where Thomas Feigh lived, and take care of him and look after his business affairs, appellee would receive his expenses and a monthly salary of $250 and a house of the value of $10,000.

Thomas Feigh was a bachelor, and at the time of the alleged verbal promise to appellee was about 87 years old and in poor health. He owned certain lands near Duluth which contained deposits of iron which were leased to a mining company on a royalty basis which gave him a large income. He was living alone in a hotel and by reason of the infirmities of age and ill health and being a cripple it became more difficult for

him to care for himself. Friends in Duluth advised him to procure someone to look after him physically and to also attend to his business. This need was further emphasized by an accident in 1915, in which he was injured. Early in 1915 he started on a visit to California with a relative, going by way of Chicago, where he stopped for a few days at the home of Mrs. Martha Murray, a niece. At that time appellee was living with his wife in Chicago and was in the employ of the American Can Company at a salary of $125 a month. Appellee and his uncle met and made an agreement for appellee to leave Chicago and go to Duluth to care for his uncle and look after his business for a compensation of $250 a month and expenses and, appellee says, a house of the value of $10,000, but appellant disputes any agreement for the house or its value in money. This litigation is concerned with this item of $10,000.

With due regard for the variant and contradictory stories of the witnesses, the jury could properly believe appellee's version of the agreement. Mrs. Murray, the niece above referred to, testified categorically that Thomas Feigh told her he had asked appellee to go to Duluth to take care of his business, which he was unable to attend to personally, and that he had agreed if appellee would do this to give him "a $10,000 house and expenses;" that her uncle again told her the same thing in June, 1915, and that appellee had agreed to this.

Appellee subsequently gave up his business in Chicago and went to Duluth to live. While there he and his uncle looked for different residences for sale and visited the office of Thomas Feigh's attorney, where the uncle left $250 as earnest money on account of the purchase of a certain lot, which transaction, however, was not carried out, as the seller was not able to give a good title. Thomas Feigh repeated to a Mr. Mahoney, cashier of a bank in Duluth,

a friend of many years, the agreement he had made with appellee as to his compensation, including the $10,000 house.

In January, 1916, Thomas Feigh was seriously ill and appellee removed him to a hospital and there cared for and nursed him until his removal in April. Appellee also looked after his uncle's business, attended to his banking matters, depositing checks for royalties, and other details. In April, 1916, Thomas Feigh came to Chicago to live, making his residence with his niece, Mrs. Murray, until his death on October 26, 1916. In the fall of 1916 a suit was commenced against him by a party claiming one-half interest in two of the iron mines, involving much expensive litigation, to all of which appellee gave his time and attention in preparing evidence and in conferences, and brought his uncle from Chicago to Brainerd, Minnesota, and cared for him during the two weeks consumed in the trial. The uncle expressed himself repeatedly as very much pleased and gratified with the care and attention bestowed on him and his affairs by his nephew.

A further attempt was made to procure a house for $10,000, but apparently nothing suitable could be found; thereupon Thomas Feigh said to appellee, in the presence of witnesses who testified thereto, "Let it go then; I'll give you $10,000 and you can do what you like with it." There was also evidence that in the summer of 1917 appellee and his uncle had a conversation in the residence of Mrs. Murray in Chicago, in which appellee asked his uncle when the promised $10,000 would be paid him, and was told by the uncle that he did not wish to draw the money out of the bank at that time, as he had his lawyers to pay, and he wanted to wait until the lawsuit was over, but that his nephew need not worry, for if he did not get it now, "after I am dead there is plenty in my estate and you can get it there." Appellee continued to give

attention by nursing his uncle, who was virtually helpless, and caring for his physical requirements up to the time of his death. Appellee never received the $10,000 and after his uncle died filed his claim against the estate.

Thomas Feigh left a last will and testament, in which he named as executors Edward Feigh, the appellee, John Feigh, appellant, and four others. As appellee was one of the executors, an attorney was appointed pursuant to the statute to defend the estate in the Probate court against this claim, which was allowed upon the first hearing, but subsequently John Feigh, appellant, secured a vacation of this because of some irregularity in the notice of the hearing. Subsequently upon hearing of evidence the claim was again allowed for $10,000. John Feigh appealing therefrom to the Circuit court, the claim was there tried before a jury which supported it by verdict, followed by judgment.

The appeal to the Circuit court was not taken by the attorney appointed on behalf of the estate, but was taken by John Feigh individually and as co-executor, and he seems to be the only person opposing the claim. There is considerable discussion tending to show that his motive for this opposition is because of disappointment at not receiving from his uncle what he had expected.

Other witnesses gave testimony as to conversations with Thomas Feigh tending to support appellee's version of the agreement between him and his uncle. From this testimony and from other circumstances present, the jury properly could conclude that Thomas Feigh had first promised appellee, in consideration of his services to himself and his business, in addition to a salary and expenses, a house costing $10,000, but when it proved difficult to procure a suitable house the character of this compensation was changed by the uncle to $10,000 in money. As the services agreed upon were rendered and this part of the compensa-

tion was not paid, claimant was entitled to an allowance for this amount against the estate.

Defendant asserts an accord and satisfaction to defeat the claim. In June, 1917, Edward Feigh made out a check for $1500 to his own order, which was signed by his uncle, who directed that on the stub of the check book the notation, "In full for services from June 22, 1917, to June 17, 1918," be made. Apparently about this time appellee, by agreement with his uncle, was to receive one-half of the amount of $250 a month, the salary first agreed upon, with the understanding that appellee could accept other employment in addition to his attention to his uncle's affairs, which would not occupy all appellee's time. This check is said to be an advance payment for one year under the new arrangement. There was evidence indicating that neither Thomas Feigh nor his nephew, appellee, considered this as modifying in any way the promise to pay $10,000, and Thomas Feigh so stated. A few days before his death Thomas Feigh told his nephew, Thomas Murray, that, "Edward Feigh also has $10,000 coming to him and I want you to see that my will is carried out and that Edward Feigh gets his money too." There was other evidence of transactions or statements by Thomas Feigh indicating that it was not his intention that this $1500 check should affect in any way the promised $10,000. One of the factors constituting accord and satisfaction is that the amount paid must be given in settlement of a claim in dispute. The Farmers and Mechanics Life Association v. Caine, 224 Ill., 599; Janci v. Cerny, 237 Ill. 359. There is no evidence of any dispute between appellee and his uncle as to the promise of $10,000, hence the acceptance of the $1500 check had no relation to that.

Appellant contends that the promise of Thomas Feigh

to convey a house to his nephew was merely a promise to make a gift and not as compensation. The evidence does not support this, but from many things said by Thomas Feigh it is shown that $10,000 was intended as compensation for services rendered to the uncle.

It is said that the promise to convey a "house" is too uncertain to be enforcible. As we have said above, the evidence shows that when a suitable house was not readily found, the character of the compensation was changed into money.

It is claimed that there is a variance between the evidence showing an agreement to pay $10,000 in money and the claim filed in the Probate court, which asserts a promise to convey a house to the value of $10,000. Claims against the estates of decedents are purely statutory proceedings and not strictly proceedings at law or chancery. In pleading they are much like the practice in the justice of the peace courts, where the case is what the evidence makes it. Grier v. Gable, 159 Ill. 29; Thomson v. Black, 200 Ill. 468. All that is required as to the form of such a claim is that it should specify and identify the transaction out of which the claim arose, so that all concerned may know of its general nature and character for the purpose of investigating and defending, if necessary. The present claim met this requirement.

As the evidence shows the promise was to pay money, the Statute of Frauds is not involved.

Appellee has alleged cross errors touching the appeal bond, and asks us to act upon these in the event of a reversal. As this contingency does not occur, it is unnecessary to consider the cross errors.

The evidence justified the verdict; under the law the judgment properly followed, and it is affirmed.

AFFIRMED.

Dever, P. J., and Matchett, J., concur.

280 - 26950

ANDREW HEINERTSON,
Appellee,

vs.

J. W. STRICKERT,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

224 I.A. 633

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, a carpenter, while employed by the defendant received injuries through an accident. He brought suit for compensation, claiming that the accident was caused by the negligence of defendant, and upon trial had a verdict and judgment for $1250. Defendant appeals.

The declaration alleged that the negligence of the defendant consisted in the violation of the provisions of an act for protection of workmen engaged in structural work in force July 1, 1907, Illinois Statutes (Hurd) 1909, page 1098. Thus provides:

> "That all scaffolds, hoists, cranes, stays, ladders, supports, or other mechanical contrivances, erected or constructed by any person, firm or corporation, in this State, for the use in the erection, repairing, alteration, removal or painting of any house, building, bridge, viaduct, or other structure, shall be erected and constructed in a safe, suitable and proper manner, and shall be so erected and constructed, placed and operated, as to give proper and adequate protection to the life and limb of any person or persons employed or engaged thereon, or passing under or by the same, and in such manner as to prevent the falling of any material that may be used or deposited thereon."

We hold that plaintiff failed to prove that the accident happened because of any violation of this statute, and that the evidence shows that it was brought about by another cause.

The occurrence was in the early part of September, 1911. Plaintiff with others was employed by defendant in removing certain hangars which had been erected on the lake front in Chicago. There were

fifteen of these which were so constructed as to be temporarily erected at one place and then taken apart and erected at another place. The defendant had not erected them on the lake front, but was taking them down for erection elsewhere. They were about 30 to 40 feet wide and 60 feet in depth, about 14 feet high in front, which faced east, and 10 feet at the rear. The framework consisted of 8 X 8 wooden posts in the walls at intervals of 16 feet, cross braced by braces running from the top of one post to the bottom of the next. The side walls and partitions were nailed in sheets to these braces. Three iron girders rested on top of these posts running from north to south over each hangar, leaving a free space below for the housing of aeroplanes. Upon these iron girders were laid wooden roof joists 2 X 10, 16 feet long, running east and west. On the top of these roof joists the roof boards were laid in sheeting 7/8" thick and on these roof boards a covering of tar paper was laid.

The work of removal had been progressing about two and one-half days before the accident. The work was begun on the hangar at the north end. The tar paper was first removed, then the roof boards taken off in sheets, then the joists which had been standing on edge were turned over on their flat sides, resting across the tops of the iron girders. Then the partition walls were removed. At the time of the accident the north wall roof and front and rear of the first hangar had been entirely removed. On the second hangar the front and the roof sheeting had been removed and the joists laid flat on top of the girders. The north wall also had been removed. Plaintiff and another carpenter were lying prone upon the joists of the second hangar and plaintiff was trying to put a rope around a window frame in the rear, when that part of the hangar collapsed and plaintiff fell to the ground, receiving the injuries in question.

[illegible]

[illegible]lloon of sheet which were so constructed as to be temporarily [illegible]ected at one place and then taken apart and erected at another [illegible]ace. The defendant had not erected them on the Duke Tract, but [illegible]n taking them down for erection elsewhere. They were about 70 or [illegible] feet wide and 60 feet in depth, about 14 feet high in front, with [illegible]ood seat, and 10 feet at the rear. The framework consisted of 6 [illegible] [illegible]ches pipe in the walls by intervals of 12 feet, braced by [illegible]ches running from the top of one post to the bottom of the next. [illegible] side walls and partitions were walled in sheets to three heights. [illegible]ese iron gutters rested on top of these posts running from north [illegible] south over each hangar, leaving a free space later for the hangar[illegible] of aeroplanes. Upon these iron gutters were laid wooden roof [illegible]lates 4 X 12, 12 feet long, running east and west. On the top of [illegible]ese roof joists the roof boards were laid in sheeting 7/8" thick [illegible] on these roof boards a covering of tar paper was laid.

The work of removal had been proceeding about two [illegible] and somewhat days before the accident. The work was taken on the [illegible] at the south end. The iron posts and first rafters, from the [illegible] roof boards all in sheets, then the joists which had been [illegible]ling or slip were turned over on their flat sides, workers [illegible]ere the iron at the high gutters. Then the partition walls were [illegible]ed. As the time of the accident the north half of the roof [illegible] of the first hangar had been entirely removed. On the sou[illegible] hangar the roofs and the roof sheeting had been removed and the [illegible] lain flat on top of the gutters. The posts still rose and [illegible] removed. Electric and gasoline motors were lying around [illegible] the joists of the second hangar and plaintiff was trying to [illegible] a rope around a stone frame in the rear, when this part of [illegible] hangar collapsed and plaintiff fell to the ground, receiving [illegible] injuries in question.

Plaintiff sought to prove that these wooden joists lying on top of the girders were not adequate to prevent the unsupported iron girders from turning over; that this is what happened, and that the insufficiency of these joists to prevent this was a violation of the statute above quoted.

It is extremely doubtful whether these roof joists laid upon their flat side can be said to be "stays * * * or supports or other mechanical contrivances, erected or constructed * * for the use in the * * * removal * * of any house, building * * or other structure." Regardless, however, of this, the evidence shows that the building collapsed, not because of the failure of these joists to hold the iron girders in an upright position, but because the supporting posts underneath were weakened by the foreman knocking out one of the braces supporting them. Plaintiff in describing the accident says that the foreman was "whacking away down below on an angle brace running from the top of one post * * * * to the bottom of another that supported" the girder where he was lying, and "in the time he was whacking, the whole thing shook and gradually started to go. The rear side * * * went down in a body." He further said that if the foreman had not done this there would have been no accident because he would have known better "than to go and knock off the brace and let the whole thing fall down." And again that the foreman "kept pounding and hitting that brace and loosened the whole thing." The son of plaintiff working on the hangar testified, "There was one brace there on the side that Mr. Schaefer knocked down without giving the men on the top any warning. Of course when he knocked this brace down the whole works went down. The wooden joists fell when the girders fell." That he did not merely shake the brace "but knocked it out." From these and other similar statements,

which are not contradicted and are in fact the evidence of the plaintiff, it is clear that no matter how the roof joists were laid on top of the iron girders, or whether or not they were fastened to them, would have no tendency whatever to keep them from falling when the supports underneath were knocked out and weakened; that these joists lying on top of the girders could not possibly have prevented the collapse of the structure when the supporting timbers beneath were made insufficient to hold up the structure, seems too obvious for argument.

This being true, the judgment must be reversed because of a failure to prove that the accident was caused by the negligence of the defendant alleged in the declaration, and as the evidence shows that the accident happened through the actions of the foreman working on the job as a fellow servant, we shall make a finding of fact.

REVERSED WITH FINDING OF FACT.

Dever, P. J., and Hatchett, J., concur.

280 - 26950 FINDING OF FACT.

We find as a fact that the accident in question was not caused by the negligence of the defendant as alleged in plaintiff's declaration or any count thereof.

17 - 26179

(Certiorari denied)

MICHAEL PILIGENTI,
Defendant in Error,

vs.

NEIL G. SCHMIDT, Receiver of
SUBURBAN RAILROAD COMPANY,
Plaintiff in Error.

ERROR TO SUPERIOR COURT OF
COOK COUNTY.

224 I.A. 633

MR. JUSTICE MAGRUDER DELIVERED THE OPINION OF THE COURT.

In this case the plaintiff sued the defendant, a common carrier, in an action on the case. The case was tried by a jury, which returned a verdict finding the defendant guilty and assessing the plaintiff's damages at $30,000. Motions for a new trial and in arrest of judgment were overruled and judgment entered on the verdict. Appeal was prayed, but the complete record was not filed in this court within the time prescribed by statute, and a writ of error was afterwards sued out.

The original declaration in the first count alleged that defendant was a receiver of a street railway company which operated and controlled a certain street car and the tracks and roadbed over which it operated; that the Suburban Electric Railroad Company was the lessee of the railroad tracks and the cars operated thereon; that on the 26th of April, 1910, defendant received plaintiff as a passenger upon the front platform of one of its eastbound cars; that the car was defective and out of repair, which the defendant knew or should have known; by reason whereof the plaintiff, while in the exercise of care, was injured.

The second count, adopting the language of the first as to the situation at the time of the accident, alleged that plaintiff while a passenger in the exercise of care, was thrown and injured because, "defendants so negligently and carelessly managed and operated said car." The third count, also adopting the language of

the first, in the first and second paragraphs thereof averred that defendant negligently and carelessly ran said car over a track and roadbed that was out of repair and defective, and by reason thereof said car would bound and sway, and plaintiff was thereby thrown and injured.

February 24, 1913, the declaration was amended by striking out the first count and by inserting in the appropriate place in the second count the words "steps of the", so that it was made to read "steps of the front platform," instead of, "platform." At that time an additional count was filed in which it was alleged that defendant received plaintiff "as a passenger upon the steps of the front platform of one of its eastbound cars," and that defendant so negligently and carelessly operated the car, and negligently and carelessly ran it over tracks and roadbed that were out of repair and defective, that plaintiff was then and there thrown from the car and injured.

Defendant interposed a demurrer, which was overruled, whereupon he filed five pleas: first, not guilty; second, non-operation and control of the tracks, roadbed, etc.; third, that he did not receive plaintiff as a passenger upon the steps of the front platform; fourth, the statute of limitations, that the cause of action did not accrue within two years prior to the commencement of the suit; fifth, statute of limitations, that the cause of action did not accrue within two years of the amendment to the declaration. Plaintiff demurred to the third, fourth and fifth pleas, and the demurrer was sustained.

The points raised by plaintiff in error are so numerous as to preclude an exhaustive discussion of all of them, and as to some such discussion would not seem to be necessary. It is argued that the court erred in overruling the demurrer of defendant to

plaintiff's amended and additional counts; but defendant cannot raise this question because by thereafter filing pleas he abandoned his demurrer. Mason v. Neal, 204 Ill. App. 538; Chicago & Alton R. R. Co. v. Clausen, 173 Ill. 100; Hamberger v. E. F. & S. Co., 245 Ill. 448.

It is also contended that by filing the amendment to the declaration and adding the additional count, the declaration was made to state a different cause of action, and therefore became vulnerable to the plea of the statute of limitations. That this point is not well taken is, we think, conclusively settled by South Chicago City Ry. Co. v. Kinnare, 216 Ill. 481; Town of Cicero v. Bartelme, 219 Ill. 356.

It is also contended that the court improperly permitted the attorney for plaintiff to ask a witness if he saw the plaintiff "when his left hand broke loose," but it was a fair inference from the testimony of the witness previously given that the left hand was broken loose, and leading questions may be permitted in the discretion of the court.

It is also contended that the court improperly permitted another witness for plaintiff to answer the question as to the position of plaintiff's body "at the time his left hand hold was broken," and in permitting another to state that the tracks were in "poor condition," while defendant's witness was not allowed to say the tracks were in "good condition." But in the case of plaintiff's witnesses, the statement fairly epitomized the former statements of the witnesses, while in the case of defendant's witnesses it did not. Nor was there error, as plaintiff in error contends, in the admission of evidence for plaintiff as to the condition of the tracks on which the car ran at other times than the day of the accident. City of Bloomington v. Osterle, 139 Ill. 102.

Nor did the court err in refusing to permit defendant to

cross examine a witness for plaintiff as to the construction of the tracks, the direct examination of the witness having been limited to the correctness of the representations of certain photographs.

Nor do we think the court erred in allowing plaintiff to cross examine a witness for defendant, Dr. Tillotson, in regard to an interview which the witness testified he had with plaintiff on a certain date, although the Doctor had not been asked about that interview on direct examination, since all the interviews concerned the same subject matter. Nor do we think the court erred in a remark made in a colloquy with Dr. Tillotson when the Doctor was testifying as to the mental control of plaintiff at a certain time, when the court said: "Very well, that is your answer to this question? A. Yes. The Court: That is all, that's his answer."

Upon objection made by defendant the court explained to the jury that he did not mean to convey the thought which counsel for defendant said he feared would mislead the jury.

Nor do we think reversible error was committed when the court required the witness Tillotson to compare his memory on two subjects, since the answer of the witness was of such a nature as to preclude possible injury. McMahon v. C. S. Ry. Co., 230 Ill. 541

Nor do we think the court erred in allowing the witness Armentino to testify that the street car was bouncing when someone called out, "A man has fallen off, and I think he is killed." This remark was, we think, a part of the res gestae, and was therefore admissible. Swanson v. C. C. Ry. Co., 242 Ill. 595. Livingston v. Illing, 138 Ill. App. 494; S. S. Ry. Co. v. McDonough, 221 Ill. 65.

Nor do we think the court erred in refusing to strike out the answer of the witness Gaudets, who, having said on cross examination that the tracks of the Railway company were full of

right angles and twists, up and down and sideways, was asked by defendant's counsel, "You mean it looked like that, do you?" and replied, "Yes, sir, that is the description we had given it many and many a time," since the first part of the answer was responsive and the second proper as an explanation, in view of the question asked.

One of the alleged errors much relied on is, that "There were two prejudiced and unfair jurors, who made false statements on their voir dire, whose presence on the jury vitiated the verdict." It is argued that a new trial should have been granted for this reason. The jurors in question were Hartzell and Goodpasture. The allegation that they answered falsely is, as to Hartzell, based on the following questions and answers. The questions were put by counsel for plaintiff.

> "Q. Have you ever been connected either directly or indirectly with a controversy of this character? A. No sir.
> Q. Of course, I mean outside your experience as a juror, if that ever occurred? A. I have not."

Juror Goodpasture upon his voir dire was interrogated and responded as follows:

> "Q. Have you ever been interested in a lawsuit of this kind?
> A. Nothing, only as a juror.
> Q. I take it you haven't any feelings one way or the other in respect to a case of this kind. A. No.
> Q. And if I were to put to you in the same form the questions that were put to Mr. Hartzell or Mr. Haine, or any other veniremen ahead of you, would you answer any of them different?
> A. I would not."

The jurors named had replied to questions asked them that they were without prejudice and would be fair and impartial jurors. The contention that these answers were untrue and the jurors prejudiced is based upon certain affidavits submitted to the court in support of the motion for a new trial.

As to juror Hartzell there was evidence tending to show that prior to the trial he had, as next friend for his minor daughter, brought suit against the C. & N. W. Ry. Co. for an al-

leged injury received by the daughter while riding on a train of said company December 26, 1915. The papers filed in the case showed, however, that the suit was a friendly one; that a settlement of the case was made and that a formal suit was necessary by reason of the fact that the injured daughter was a minor. A record of that case shows that a jury was called, heard the evidence, returned a verdict of guilty and assessed the plaintiff's damages at the sum of $145; further, that a judgment was entered on the verdict and satisfied; that Hartzell was appointed guardian ad litem of the minor August 23, 1916; that he filed an inventory showing that he had received $100 from the Railway company on account of this accident.

The affidavit of one Twyman was submitted by defendant, in which among other things the affiant says that after the trial he asked Hartzell why he had answered the questions on his voir dire as he did, and that Hartzell replied that the stenographers were all wrong; that he did answer the questions and said he had been interested on account of his daughter having been injured and that the case was settled. Affiant says Hartzell stated, "If your people asked me if I had ever been interested in a street car claim, I said no; if they asked me relative to a steamroad claim, I said yes." The affidavit also set up alleged conversations which affiant said he had with other jurors relating to actions of Hartzell and Goodpasture in the jury room. Defendant also produced affidavits of certain jurors, which were to the effect that Goodpasture on several occasions while going into the jury room during the intermissions of court, said that he "had worked for corporations for twenty-six years, and that he knew them and knew of their tricks, and that he was favorable to giving a big verdict to plaintiff," and that he was prejudiced against corporations generally. These affidavits further say that Goodpasture in the jury room gave no arguments concerning the merits of the case,

but said all corporations were wrong and would try and get the best of you.

These affidavits say that juror Hartzell said in the jury room, "They" (meaning street car companies) "are pretty foxy about getting you to sign papers. I have a daughter that had her hand hurt by one of the railway companies, and one claim agent came up and got me to sign a paper to settle the case for $100. I had to give a bond and have myself appointed guardian, and had to pay for that bond for several years." These affidavits further say that juror Hartzell said, "I wasn't asked if I had anything to do with this kind of a case, and I did not volunteer the information."

The affidavit of Judge McEwen, who tried the case for the defendant company, was submitted in its behalf. It was to the effect that in selecting the jurors, he relied upon the truthfulness of their answers, and that, if these two jurors had answered truthfully, he would not have accepted them, and that at the time of the examination of each of them he had not exhausted his peremptory challenges, and that he would have challenged both of them for cause or peremptorily had the facts been made to appear at that time.

Defendant also submitted the affidavit of Petrie, telegraphic censor for the C. B. & Q. Ry. Co. This affidavit stated that juror Goodpasture had worked under him for many years; that he had been removed from the service on account of the state of his health, and had for a time received disability payments, which were discontinued about August 1, 1916; that he had attempted to be reinstated in his former position, but without success; that he had complained about the failure of the Company to reinstate him in his former position, and to pay him disability benefits; that affiant did not remember the exact words used, but that in speaking he had made violent and angry gestures, and had indicated by his facial expression and general manner that he was very angry at the Company; that he was afterwards employed by the Western Union, but continued to assert

his claim against the Railway company by means of letters, etc., all of which were acted upon unfavorably. Corroborating this affidavit was that of the superintendent of the relief, surgical and employment department of the C. B. & Q. Ry. Co.

In support of the verdict plaintiff produced the affidavit of Messmer, a partner of the attorney for plaintiff. He attached to his affidavit pleadings in the case of Lebovsky v. C. C. Rys. Co., and the Chicago Surface Lines, a case which was tried immediately preceding the instant one in the Superior court. From the record it appears that was an action on the case; that Goodpasture was foreman of the jury; that Hartzell served on it and that the jury brought in a verdict for the defendant Railway company.

The plaintiff also submitted the affidavit of juror Hartzell, who alleged that his answers upon voir dire were true. While admitting that he is the party who brought the friendly suit against the C. & N. W. Ry. Co., he said that the representatives of the Railway company advised him that the judgment was desired solely to protect it from other claims in the matter; that he had nothing whatever to do in the preparation of any papers filed in connection with that suit, and knew nothing about their contents save as they had been read to him and shown to him on that day. He further states that during the deliberation of the jury he did not make statements as claimed, but stated in substance, "I had a young daughter that had her arm hurt while riding in one of the C. & N. W. railway company's trains, and one of the claim agents for this railroad company called on me and offered to settle the matter for $110. I thought it was all right and arranged for the settlement, and he had me sign some papers to that effect and papers to appoint me guardian, and required me to pay for a bond for several years, and I did not find that out until sometime later, and did not read the papers when I signed them, and did not know there was anything of that kind in

them." He positively denied making the statement either in words or in substance, "I wasn't asked if I had anything to do with this kind of a case, and I didn't volunteer the information." As to the statement with reference to the daughter's claim and his denial of having made this statement about not volunteering information, juror Hartzell is corroborated by the affidavits of a number of jurors.

We think that under the law the court should not have received the affidavits of jurors for the purpose of impeaching the verdict rendered by them. As was said in Sanitary District v. Cullerton, 147 Ill. 386:

> "This court in an unbroken line of decisions from the case of Forrester v. Guard, Breese 74, is committed to the doctrine that the affidavits of jurors cannot be received for the purpose of showing cause for setting aside the verdict. There may be dicta in some of the cases, intimating a contrary rule, but in every case where the question has been before the court and determined, the principle has been adhered to."

In the same opinion the court quotes with approval the language of Lord Ellenborough in Rex v. Wooley, 2 Stark 111:

> "The danger would be infinite if an affidavit could be received from the jurymen for the purpose of setting aside a verdict."

Also from the language of Lord Mansfield in Owen v. Warburton, 1 New Reports, 328, to the effect that "considering the arts which might be used if the contrary rule were to prevail, we think it necessary to exclude such evidence."

It is the established law, we think, of this State that while affidavits of jurors cannot be received for the purpose of setting aside a verdict, they may be received for the purpose of sustaining it. City of Chicago v. Dermody, 61 Ill. 431; Sanitary District of Chicago v. Cullerton, supra. There is an expression to the contrary in West Chicago R. R. Co. v. Dunkin, 88 Ill. App. 406, but the case was apparently not carefully considered. The court therefore, we think, either should not have received or, if receiving, could properly disregard, the material averments of the affi-

davits of the jurors submitted in support of the motion for a new trial. If these are disregarded there is no evidence here to indicate prejudice on the part of either of these jurors against this particular defendant. It does not appear that they had any interest in the case, knew anything about it, or had formed any opinion whatsoever. It may well be doubted whether the suit brought by juror Hartsell for his daughter indicates a controversy within the meaning of the question asked. The questions to both jurors were asked by the attorney for the plaintiff. If the attorney for defendant had enquired with further particularity, undoubtedly all the facts would have been disclosed. We think the court did not err in refusing a new trial by reason of anything stated in these affidavits.

Plaintiff in error also insists that the court erred in sending out part of the impeachment exhibits and not all of them. He also claims that some not sent out were discredited by the court.

The record shows that as the jury retired one of the jurors stopped and asked the court if the jury might have the exhibits; that the court replied that that matter would be determined later; that after the jury retired the court asked counsel if there was any objection to sending out the exhibits; that the attorney for plaintiff objected to giving the jury the impeachment affidavits on the yellow paper (hereafter discussed), and that the attorney for defendant urged that these should go to the jury. The court held against defendant's contention, whereupon the court permitted certain exhibits, which were reports made by Dr. Tilletson as to his conversations with the plaintiff, to go to the jury, also certain exhibits offered by both parties, a blue print and an ordinance.

Defendant excepted to the ruling of the court in refusing to send out the other exhibits, and the attorney for the plaintiff then said, "The jury are sure to be asking for these exhibits,

and if they do, we think the judge should explain to the jury that those that are held out are on the ruling of the court, and not because the defendants keep them out." The court replied, "That will be taken care of."

It further appears that the bailiff in charge of the jury was afterwards asked by members of the jury whether they might have these exhibits, and that the bailiff, without asking the court, replied, "You have got all you are going to get." The reports of Dr. Fillstcom were offered in evidence by the defendant. Plaintiff at first objected, but withdrew his objection. These were sent out at request of defendant's counsel. We think the court properly sustained the objection of plaintiff to sending the other impeaching statements to the jury. Smith v. Stickleman, 58 Ill. 141; Johnson v. Fairbank, 156 Ill. App. 386; Fain v. Covenant Mutual Benefit Assoc., 68 Ill. App. 274; Nelson v. Elevated Ry. Co., 170 Ill. App. 119. If the defendant feared the jury would misunderstand, he should have asked a written instruction from the court covering the matter. This he did not do.

Appellant also contends that the court erred in the giving and refusing of certain instructions. Plaintiff's given instruction No. 3 is as follows:

> "If you find from a preponderance of the evidence under the court's instructions as to the law, that the defendant received the plaintiff as a passenger upon the car in question at 45th avenue, to carry him as a passenger upon said car, then, while he was defendant's passenger, it was the defendant's duty to do all that human care, vigilance and foresight could reasonably do, consistent with the character and mode of conveyance adopted, and the practical operation of defendant's business as a carrier, to avoid injury to plaintiff."

It is claimed this instruction was misleading in that the statement of defendant's duty was abstract, and omitted due care required of the plaintiff. Appellant cites as an authority in support of this contention Roberts v. Chicago City Ry. Co., 262 Ill., 223.

It will be noticed that the instruction here complained of does not direct a verdict. It undoubtedly states the law correctly as far as it goes. Nath v. Chicago City Ry. Co., 243 Ill. 114. The facts are not at all similar to those which existed in Roberts v. City Ry. Co., supra, where on defendant's theory of the case there were two respects in which it was claimed the injured party was guilty of contributory negligence, and the condemned instruction covered only one of them.

Appellant also urges that the court erred in refusing its requested instruction No. 5. This instruction pointed out the fact that plaintiff was on the steps of the car at the time he was thrown or fell from it, and told the jury that he was required under the law to use such "extra effort as might be reasonably required" of a person in such a situation to prevent injury to himself from known or apparent risks incident to such riding. Plaintiff was bound to use that degree of care which an ordinarily prudent person in the same or similar circumstances would be accustomed to use. Roberts v. Chicago Street R. Co., supra. The jury were so instructed, and it was not necessary to repeat this instruction in the phraseology requested by the defendant.

Appellant also complains that the court refused to give at the request of defendant an instruction which told the jury

> "If the jury find from the evidence that the movement of the car claimed by the plaintiff to have caused the accident was occasioned by the placing of cartridges, torpedoes or other combustibles upon the street car tracks at the place of the accident by third persons, without the consent or knowledge of the receiver or without notice to him, then the jury will find the defendant not guilty."

Some of the witnesses mentioned a noise occurring about the time of the accident, occasioned possibly by cartridges or torpedoes; but there is no evidence in the record from which a jury could reasonably find that any such cartridges or torpedoes were placed on the track or caused the accident. The instruction was

therefore properly refused.

Appellant also complains that the court refused, at its request, to give the following instruction:

> "If the plaintiff, at the time he boarded the car, could have ascended to the platform and found a safe place to ride, he was bound to do so, and if the jury find from the evidence that there was room upon the platform, and that it was a safer place than the step, then the plaintiff cannot recover in this action, regardless of whether the defendant was negligent or not."

We think this instruction was properly rejected because it singles out a particular fact in evidence and instructs the jury that this act amounted to negligence. Whether or not such act amounted to negligence was a matter for the jury to decide. Peterson v. E. A. & S. Traction Co., 233 Ill. 403. We think, therefore, there was no error in giving or refusing instructions.

The principal contention of plaintiff in error is that the evidence is insufficient to sustain the verdict. This raises a question of some difficulty. The accident occurred April 26, 1910. The last trial was held in February, 1919. Final judgment was entered January 23, 1920. Another trial with verdict of a jury intervened. There were numerous witnesses to the occurrence, and it is claimed that their statements made on the other trial and at other times contradicted the statements made by them upon this trial. Some of the witnesses who testified on the last trial were not called on the first one. The lapse of years had impaired their memory as to the facts surrounding the accident. Certain facts are, however, practically uncontradicted.

Plaintiff was at the time about 22 years of age. He was by birth an Italian and by occupation a laborer. He worked as a janitor for the Western Electric Co. He received a salary of about $14 or $15 a week. He was uneducated. He had been in this country some three or four years. His knowledge of English was quite limited. Four about a year after the accident he was out of employment, then

worked in an employment office at $3.50 a week, and at the time of the trial was working for the C. & N. W. Ry. Co. at a salary of $65 a month.

The Suburban R. R. Co., on whose line of railway the accident occurred, was at that time being operated by a receiver, who has since been succeeded by the defendant receiver in this case. The line of street railway operated ran from the intersection of 40th avenue with West 22nd street. Fortieth avenue is a highway running north and south; West 22nd street is a public way extending east and west. The street railway line ran westerly on 22nd street to the limits of the city and thence in a southwesterly direction to the suburban villages of Riverside and LaGrange. On the south side of 22nd street at its intersection with 40th avenue was located one of the gates to the entrance of the plant of the Western Electric Co. for which defendant worked. It was customary for the employes of the company to go out of this gate at the noon hour, crowd upon the street cars and ride east to 40th avenue, where there were lunch rooms and restaurants patronized by them.

On the day in question the eastbound car arrived in front of this gate a little after noon. A crowd of employes boarded it. Plaintiff was among these, and was about the last to get on. He stood on the lower step of the front of the platform of the car, and took hold of the handlebar with one hand, holding a bundle in the other. The construction of this car, the parties agree, was as follows: It was the interurban type; the step was 28 inches long; the bottom step was 10 inches from the ground, 13 inches to the second step, which in turn was 12 inches below the edge of the platform. The steps were inset, the lower step projecting under a second step, and the second under the edge of the platform, making a sort of ladder effect. The sill of the car extended its entire length, and the steps were attached to it under the edge of the platform. The platform

widened towards the front from the steps at an angle with straight front, and in turn an angle running to the other side corresponding with the angle from the step. The greatest depth of the platform from the center back to the car partition was 4 feet 2 inches; the space of the platform was occupied by the controller box, the engine or air valve at its right, a sand box on the inner angle and a compressor box 24 inches by 24 inches by 30 inches high. The greatest width of the platform was 8 feet 6 inches, and taking out the space occupied by the various items of equipment of the car and the place where the motorman stood, there remained about 25 square feet.

As the car proceeded east, and at a point concerning which there is some conflict in the evidence, plaintiff's hat blew off. He called to the conductor to stop the car; the conductor paid no attention. Some of the passengers repeated plaintiff's call, imitating in a jocular way his broken English. A little later plaintiff, as he contends, had his hold on the handle bar broken by the jar of the car and by some passengers pushing or being thrown against him, was thrown from the car, fell under the wheels and received such injuries as required the amputation of both his lower limbs.

The manner in which he left the car is the controlling question of fact in the case. Plaintiff says he was involuntarily thrown from it. Defendant contends that he voluntarily jumped for the purpose of getting his hat. On this, as other issues of fact in the case, the jury has spoken and the trial Judge has approved their verdict. The rules which must control this court on the review of questions of fact are well settled. If a verdict is manifestly and clearly against the preponderance of the evidence it is our duty to reverse and order a new trial; or if the preponderance is so clear as to convince that the plaintiff ought in no event to recover, we may reverse the judgment with a finding of fact. This is a power to be exercised with great care and caution and only upon the clearest ground

As to several issues of fact we have without difficulty reached the conclusion that the verdict of the jury was justified. We think it is clearly established by a preponderance of the evidence, contrary to defendant's contention, that it was usual for the conductor on this train to collect such fares from passengers riding on the cars as he was able to collect in the short run made, and that plaintiff, who testifies that on prior occasions he had paid his fare and was at this time ready to do so, was a passenger, and defendant therefore obligated to such a degree of care and caution as is required of common carriers to such passengers.

We also think the jury was justified in finding, also contrary to defendant's contention, that the car was well filled with passengers; that the seats and aisles were filled, and the platform as well, and that plaintiff was therefore not necessarily guilty of contributory negligence in riding upon the steps of the platform of the car. We think also that the jury was justified (assuming for the moment that the plaintiff and other witnesses testified truthfully as to the manner in which the plaintiff left the car) in finding that defendant was in two respects guilty of negligence proximately tending to cause plaintiff's injuries. First, that, as alleged in the declaration, it maintained its tracks in an unsafe and dangerous condition; and, secondly, that it carelessly operated its car on these defective tracks at a rate of speed which, under all the circumstances, was dangerous to the life and limbs of its passengers. These facts are established by the testimony of witnesses called in behalf of defendant as well as of plaintiff.

But when all this is conceded there remains for consideration the vital question whether the verdict of the jury should not be set aside. For if it be conceded that a clear preponderance of the the evidence tends to show that plaintiff voluntarily jumped from the car while it was in motion, instead of being involuntarily thrown from it, then the plaintiff cannot recover, first because such

voluntary jumping from the car while it was in motion would be in law and in fact such contributory negligence as would preclude his recovery; and, secondly, because such voluntary jumping would be the sole proximate cause of the injuries which plaintiff received. This question, therefore, becomes the controlling issue of fact in the case. Here again, after a careful consideration of all the evidence, and assuming that the plaintiff and his witnesses are unimpeached, we think a clear preponderance of the evidence indicates that plaintiff did not jump from the car, but was thrown from it without fault on his part. Whether these witnesses have been successfully impeached we will consider later. In number of disinterested witnesses, in opportunity of the witnesses to know the actual facts about which they testify, and in the probability of the facts related, we think the advantage is clearly with the plaintiff.

The testimony indicates that at the time plaintiff was thrown or jumped from the car it was moving at a speed estimated by witnesses for both sides at from 8 to 30 miles an hour. It is not usual for persons in their senses to jump from trains moving at this rate of speed, thus inviting injuries such as the plaintiff in this case received. Moreover, the danger in the instant case was increased by the fact that it had rained in the morning and the tracks and the way were apparently muddy and slippery. The number of disinterested witnesses, therefore, and the reasonableness of their testimony favor the plaintiff. But the defendant, as against this, contends that not only these witnesses, but the plaintiff also, have been impeached by proof of statements made by them at other times, inconsistent with the testimony given upon the hearing of the cause.

We shall first consider these contentions as to witnesses other than the plaintiff. Upon the day he was injured plaintiff was taken to St. Anthony's hospital, where it was ascertained that the amputation of his lower limbs was necessary, and to this end narcotics

were administered to him. At that time one Austin, since deceased, was the claim agent for the defendant Railway company, a position which he also filled for several of the elevated railways of Chicago. One W. A. Vallins had been a detective since 1886 and at that time operated a detective agency on LaSalle street. He had been with the Pinkertons for twenty years. He had, prior to this time, been employed by Mr. Austin to investigate some cases of this sort. He says that "Mr. Austin was kind enough once or twice to tell me he thought I was better able to handle interviews with prospective witnesses, to go ahead and do what I thought was right." Mr. Vallins gave the matter immediate and personal attention. He was assisted by a helper, Mr. Farmenter. Both Mr. Vallins and Mr. Farmenter testified on the trial for the defendant.

On cross examination certain witnesses for the plaintiff who had testified to facts tending to show that plaintiff's leaving the car at the time of the accident was involuntary, were confronted with statements signed by them, by which it appeared they had said in effect that plaintiff had voluntarily jumped from the car. The first of these statements purported to be signed jointly by witnesses Israel and Fonda. It appeared to have been made on April 26, 1910, the day upon which plaintiff was injured. The witnesses acknowledged their signatures to be genuine, but for the most part denied recollection of the interviews or of making the statements to the effect that plaintiff jumped off. Israel said: "The most part of it is true, everything in there is true, excepting that I said I saw him jump off Vallins testified to the effect that he was not sure these witnesses read the statements before signing them. He says that he wrote down the interviews correctly at the time, and that the witnesses had the opportunity to read them. These statements were all written on yello paper and with a pencil. They were not produced on the first trial.

Defendant's testimony tends to show that they had been mislaid in a lawyer's office, and could not then be found. However, neither Vallins nor Farmenter were called as witnesses at that time.

The company of which defendant is receiver had at the time of this accident an attorney, one Walter W. Ross, who is also now deceased. Ross had a stenographer in his office, who testified to certain interviews held with a number of plaintiff's witnesses in the office of Ross. These interviews took place in 1910. The stenographer testified that he took down the questions asked by Ross and the answers of the witnesses thereto, and that he wrote these out correctly. One of these witnesses was a boy, Fisher, then about 12 years of age, who was walking on the south side of 32nd street at the time of the accident and saw it. It appears that this boy told Ross that plaintiff fell off the car backwards. Some effort was made by the attorney to get him to change this statement, but he adhered to it. Another boy, Jacobs, then 14 years of age, who was walking with Mischer at the time, it appears, said in response to leading questions by the lawyer that plaintiff jumped off the car. This evidence further tends to show that the witness Israel said to Ross that plaintiff jumped; that he, Israel, saw him looking for a footing from which to jump, and told him not to do so but to wait until the car stopped.

The stenographer's transcript also shows that witness Buck said to Ross, in response to questions asked by the attorney, that plaintiff jumped.

"Q. Did you see him jump? A Yes.
Q. Did he jump backwards or straight? A He jumped straight.
Q. Did he slip?
A. He hung on the rear handle, and one leg tripped the other and went under the rear truck; he ran along three or four feet, enough to trip him.
Q. He did not slip off the step? A No.
Q. It was a pure case of jump? A. Exactly."

The stenographer's transcript further shows that this

witness claimed he was the one who told plaintiff not to jump, but plaintiff did not understand him. It also appears from the transcript that plaintiff's witness Ponda was interviewed by Mr. Ross in part as follows:

> "Q. Did you happen to be looking on Felicita at the time he jumped off the car?
> A. Yes, I was just in a position where I could see the top of his head****.
> Q. Did you see him jump? A. No, I could not tell how he jumped."

The stenographer, refreshing his memory from notes, testified that the questions and answers were correctly given; that he was present at the time when each of the witnesses was interviewed; that none others except the witness and Mr. Ross and himself were present. The stenographer was not called as a witness on the first trial, but Mr. Ross testified at that time. His evidence, however, was not read on this trial, although there was a stipulation between the parties by which it might have been read.

In weighing this evidence we must necessarily keep in mind the law as stated in the instruction given by the court to the effect that statements of witnesses, whether oral or written, other than the parties, made out of court, are admitted in evidence only for the purpose of enabling the jury to judge of the credibility of the witnesses making the statements, and are not to be considered as evidence of any fact or facts stated in them.

Counsel for plaintiff points out certain circumstances with reference to the statements appearing on the yellow slips, which, it is claimed, justify the inference that these may have been tampered with. We think these suggestions somewhat fanciful, and are not impressed by them. We have examined the original exhibits and carefully read all the evidence in regard to the making of them, and we do not think there is any tangible evidence that would justify such an inference. We are more impressed with the

argument of counsel for plaintiff, that the courts have provided careful rules for taking evidence out of court, which protect both parties, by providing that each shall have the opportunity to be present and thus protect themselves and witnesses against imposition, uncertainty or misunderstanding.

Statements of disinterested witnesses, obtained by the personal solicitation of interested parties, in the absence of any representation by the opposing party, will generally be found to be of comparatively little value. There are exceptions to this rule, but we find no circumstances here which would take these statements out of the general rule. It is peculiarly the province of the jury trying the case, and the judge who passes on the motion for a new trial, to weigh impeaching evidence of this kind. By leading, by suggestion, and by numberless other ways, it is often possible for shrewd and artful persons to secure statements which unsuspecting witnesses do not intend to give. We do not say this was done here. But we think the impeaching statements, under all the circumstances, are not sufficient to justify a finding against the verdict.

The defendant also contends that plaintiff himself is impeached by statements made in the presence of others and by his testimony given on the former trial. In so far as his impeachment out of court is concerned, this contention seems to be based on these facts. Dr. Tillotson, the physician who was employed by Mr. Austin to assist in the case, as hereinbefore explained, upon April 27th, the day following the accident, in company with Mr. Vallins, the detective, visited plaintiff at St. Anthony's hospital. Neither the Doctor nor the party accompanying him spoke the Italian language. They found the patient somewhat under the influence of narcotics at the time. The amputation of his limbs had already taken place. He was drowsy and sleepy, the Doctor says, but the Doctor awakened him.

In his report to Mr. Austin, which was admitted in evidence by agreement of the parties, Dr. Tillotson says there were three other patients in the room listening very attentively. The condition of the patient and the circumstances led him to the prompt conclusion that it would be very inadvisable to secure his signature to any instrument. The Doctor remained there, however, for about three quarters of an hour. The Doctor called again on May 2nd, accompanied by another investigator, Phillips or Vallins, and had with him an interpreter named Menico.

The Doctor testifies that plaintiff at this time told him that he, plaintiff, "was on front platform of car; wind blew his hat off; he asked motorman two or three times to stop car, and as car did not stop he jumped from car, fell to street, and rolled on street in such a way that his feet or legs got under car." This witness also says that on August 19, 1910, accompanied with one Dapples and Mr. Phillips, he called at the home of plaintiff; that the Doctor carried on a conversation with the plaintiff through Dapples as an interpreter; that Mr. Phillips wrote up the interview, and after the writing was made it was interpreted to plaintiff and that plaintiff said that statement was correct; that he was sworn to it but refused to sign it when requested. In this statement, however, which is in evidence, plaintiff does not say that he jumped off the car, but in describing the accident says when the car arrived near 42nd avenue it began to rock on account of the uneven track; that this rocking caused his feet to slip from under him off of the platform and on the street; that the rocking was so severe that in slipping he never even touched one of the two steps at the entrance of the car. Dr. Tillotson also testified on cross examination that upon the first visit plaintiff said to him that he had jumped from the car. Plaintiff says he does not remember any such conversation, and Vallins, who was present, testifies to the effect that he could not have had

the conversation because plaintiff could not speak English. Monico, the interpreter, who was present at the second interview, was not called as a witness, and his absence is not accounted for in any way.

The supposed impeachment of plaintiff, therefore, seems to rest almost entirely upon the testimony of Dr. Villetson, and there are facts and circumstances tending to corroborate the plaintiff rather than the Doctor. Both apparently were interested in the outcome of the suit. Plaintiff labored under the disadvantage at all times of an inadequate knowledge of the English language, which fact we think may account for apparent discrepancies between the testimony as given on the first and second trials. We think, on the issues of fact, we ought not on this record to overrule the jury.

Plaintiff in error also contends that the judgment in this case is excessive. On this point, however, he cites no cases. We think no recent case will be found justifying this contention.

It was made to appear on the motion for a new trial that after the case was ended, counsel for plaintiff prepared and plaintiff signed and mailed to the jurors letters thanking them for their consideration of the case. Such a practice is not to be commended but rather condemned. However, the verdict had been rendered and the jury discharged before the letters were sent; defendant was not therefore injured in this respect.

Appellant further contends that because the term of court at which motionmfor a new trial and in arrest of judgment were disposed of had passed, the court lost jurisdiction of the case and was without authority to enter the judgment. We do not think there is any merit in this contention. The record shows defendant was present at the time plaintiff moved for judgment and made no objection to the jurisdiction; on the contrary he prayed an appeal from the judgment entered.

The judgment is affirmed.

AFFIRMED.

Dever, P. J., and McBurely, J., concur.

26082

S - 26082

MICHAEL FILICETTI,
Appellee,

vs.

EMIL G. SCHMIDT, Receiver of the Suburban Railroad Company,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

224 I.A. 633

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In this case the appellant failed to file a complete record within the time prescribed by statute, and afterwards sued out a writ of error, being case No. 26179, in which an opinion has been this day filed, affirming the judgment of the lower court.

No reason for reversal appearing on this record the judgment upon this appeal must also be affirmed.

AFFIRMED.

Dever, P. J., and McSurely, J., concur.

21.50

126 - 26783

CARL C. WOLF,
Appellee,

vs.

MARION CUNNINGHAM,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

224 I.A. 634

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff in this case, who is appellee here, entered judgment by confession at the August term, A. D. 1917 of the Circuit Court of Cook County, against the defendant appellant, for the sum of $2,819.69. The judgment was entered under power of attorney contained in a promissory note, alleged to have been made and delivered by the defendant at Sullivan, Illinois, September 9, 1907, to the order of John M. Wolf, father of the plaintiff, for the sum of $1,600, due twelve months from date, with interest at the rate of 7% per annum.

At the June term 1920, defendant made a motion to open up the judgment, and in support of the motion filed an affidavit, which in substance alleged that he, defendant, was at that time a resident of Texas; that prior thereto he had been for six years a resident of Sullivan, Illinois, and was a resident of Sullivan, Illinois, at the date of the pretended note; that no demand was ever made on him for the payment of the note; that at no time in the year 1907, nor at any other time, did he execute a judgment or other note in the sum of $1,600, payable to J. M. Wolf of Sullivan, Illinois; that the note is a forgery and was never signed by him, nor by anyone authorized in his behalf. The judgment was opened up, and the defendant filed a verified plea of the general issue, and a further plea that the note was made without a

valuable consideration, and that the plaintiff was not a holder in due course.

To this plea plaintiff filed a replication that the note was given for a good and valuable consideration. December 21, 1920, defendant by leave filed an additional plea that the note was obtained by John M. Wolf by means of fraud and circumvention; that defendant was indebted to John M. Wolf in the sum of $40, and that said John M. Wolf requested defendant to give a note for that amount, and presented a new note to defendant, which he, Wolf, represented to defendant, was for the sum of $40; that said note purported to be for that sum; that relying on these representations of Wolf, defendant supposed that note presented was only for said sum of $40; but that J. M. Wolf through artifice and trickery substituted another note therefore, being the note mentioned in the declaration, and secured the signature of the defendant thereto. That thereafter defendant paid to J. M. Wolf the said $40, and J. M. Wolf promised defendant to deliver back the said note, but never did so; that defendant never knew until after the judgment was entered that J. M. Wolf had any note of defendant's for a larger sum than $40.

Plaintiff took issue on this plea by replication duly filed. The cause was submitted to the jury upon the issues as thus made up, and the jury having heard the evidence on behalf of the respective parties returned a verdict for the plaintiff on which the court, after overruling motions for a new trial and in arrest, entered judgment.

Appellant has assigned many errors only one of which it will be necessary for us to consider, and as the case must be tried again we refrain from expressing any opinion whatsoever upon the weight of the evidence. The defense apparently relied upon was that the note was a forgery. Plaintiff introduced the

[illegible] consideration, and that the plaintiff was not a bailee [illegible] the owner.

To this also plaintiff cites a proposition that [illegible] was given for a good and valuable consideration. December [illegible], 1920, defendant by leave filed an additional plea that the [illegible] was obtained by fraud w. said by means of false and misrepresentations that defendant was indebted to John G. Hall in the sum of $40, and that said John G. Hall represented himself to plaintiff [illegible] for that amount, and promised a note to defendant, which he, Hall, represented to defendant, was for the sum of $40; that said note purported to be for $40.; that relying on these representations of Hall, defendant expressed his note payable only the sum of $40; that Count 2. 4. said conversion evidence and plaintiff substituted another note therefor, being the note mentioned in the testimony, and converted the signature of the defendant thereto. That Interlocutory judgment was in 1. 2. 3. that the said $40, and 4. 5. Hall produced defendant's signature with the said note, but never did so; that defendant never made, nor authorized the plaintiff was obtained that 1. 2. that he was guilty of misrepresentation for a larger sum than $40.

Plaintiff also based his claim by replication that [illegible] title. The issue was submitted to the jury upon the issues of [illegible] and the jury brought back verdicts upholding the plaintiff [illegible] the well-taken points. Defendant's motions for the plaintiff [illegible] the court, after overruling motions for a new trial and [illegible] entered judgment.

Appellant has assigned many errors only one of which [illegible] will be necessary for us to consider, and is the only one we may be [illegible] upon or refuse from instructing the jury without instructions [illegible] the rights of the parties. The defense apparently relied [illegible] that was just the same as a gift. Plaintiff introduced the

note in evidence and defendant then offered evidence under his pleas.

In rebuttal J. M. Wolf, to whom plaintiff claimed the note was originally made and delivered, testified as to the alleged circumstances attending that transaction. Defendant, in rebuttal, offered evidence tending to impeach this witness by showing his reputation for truth and veracity was bad in the neighborhood in which he resided. Defendant Marion Cunningham, with other witnesses, testified that the reputation of said Wolf was, in fact, bad. Thereupon on cross-examination the following occurred:

"Q. How is your own reputation? (Objection)
The Court. I think it is proper. (Defendant excepted)
A. I aint found very many that had nerve enough to tell me anything about it."
Q. That is the reason why they don't do it. Isn't it? (Objected to)
Mr. Green: Now on September 3rd, 1908, you plead guilty to an indictment in the Circuit Court of Moultrie County, to keeping a gambling house and gambling, didn't you?
Mr. Miller. I object to that.
The Court. He may answer.
A. When was that?
Mr. Green. September 3rd, 1908.
Mr. Miller. I object to that, if your Honor pleases, that isn't proper impeachment, and it isn't cross examination.
The Court. I think it has some bearing on his credibility in view of the questions you have been asking him, so I will let him answer.
Mr. Miller. We except to the remarks of the court if your Honor pleases.
The Court. I am simply ruling on your objections.
A. Read the question, please.
Mr. Miller. If your Honor please, the rule is, that an indictment for a misdemeanor anything other than a felony is not admissible at all in a court proceeding to effect the credibility of witness.
Mr. Green. If it is an infamous crime, it does.
The Court. I think the objection goes to the weight of the evidence, I will let him answer."

to which ruling of the court defendant excepted. Whereupon the witness answered that he had at that time paid a fine for gambling.

That conviction of a misdemeanor such as gambling is inadmissible for the purpose of impeachment has been held in a

number of cases. People v. Newman, 361 Ill., 111; Burke v. Stewart, 81 Ill. App., 506; Lamkin v. Burnett, 7 Ill. App., 143; Daxenbekler v. People, 93 Ill. App., 553; Matzenbaugh v. People, 194 Ill., 108.

We think also the court should not have permitted on cross-examination an attack on the general character of an impeaching witness. Hector v. Hector, 8 Ill., 105; Dimick v. Downs, 82 Ill., 570.

For the errors indicated the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

Dever, P. J., and McSurely, J., concur.

26848

188 - 26848

ERNA H. MELLER and ALBERTINE H. MELLER,
Appellees,

vs.

MARY KROLICK,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

224 I.A. 634

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The appellant was defendant below in a suit for forcible entry and detainer. The case was tried before a jury, which brought in a verdict for the plaintiff, upon which the court entered judgment. The defendant was absent at the time of the trial, but she had been personally served with summons, had entered her appearance and demanded trial by jury. No bill of exceptions was ever settled by the trial judge. We can, therefore, consider only such alleged errors as are assigned on the common law record, and argued in appellant's brief.

It is first argued that the complaint is in some respects defective, but that point cannot be raised in this court for the first time upon such defects as are pointed out. Center v. Gibney, 71 Ill. 557; Willerton v. Shoemaker, 60 Ill. App. 126; Spear v. Meyer, 152 Ill. App. 470; Haynes v. Sherwin-Williams Co., 126 Ill. App. 414.

The record discloses that the cause was tried before the honorable Perry L. Persons, Judge of the County Court of Lake County, holding a branch of the Municipal Court of Chicago at the request of the Judges of said Municipal Court. It is argued that the court was not properly constituted and was without power to try the case. Section 13 of the Municipal Court act, Hurd's Rev. Stat. 1919, page 930, provides for the holding of such a court.

If appellant wished to raise a constitutional question in this regard she has sought the wrong forum, for by appealing to this court all such questions are waived. But the point could in no event be sustained. American Badge Company v. Lena Park Improvement Association, 246 Ill. 589.

The judgment is affirmed.

AFFIRMED.

Dever, P. J., and McSurely, J., concur.

21708

210 - 26870

MARTIN L. H. BARCLAY,
Appellee,

vs.

ILLINOIS BRICK TRAMING COMPANY,
a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

224 I.A. 634

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff below brought an action in the Municipal court of Chicago. In his statement of claim he alleged that on July 6, 1920, the defendant by its agent drove a certain automobile truck on the wrong side of State street in the city of Chicago, and in such a reckless and careless manner that he ran into an automobile owned by plaintiff, thereby injuring it.

The statement of claim further alleged that as a result of the injury plaintiff was deprived of the use of his automobile and was compelled to and did engage and hire another automobile to replace his own, at an expense of $140; and that the automobile of plaintiff was damaged in the sum of $390.

The defendant appeared and filed an affidavit of merits, denying the negligence as alleged and alleging that the supposed damages which plaintiff had sustained were the result in whole or in part of the negligent manner in which the plaintiff's said automobile was managed, operated and driven. Further, that plaintiff's automobile was at the time driven at a dangerous and reckless rate of speed, in violation of the ordinances and statutes. The affidavit also denied the damages as alleged. The cause was tried by the court without a jury, the evidence for the respective parties heard, and the court found the defendant ap-

pellant guilty as charged, and assessed plaintiff's damages at $390, and motions for a new trial and in arrest of judgment being overruled, entered judgment on the finding.

The defendant first contends that the finding and judgment are against the weight of the evidence. We have given careful consideration to this point. The witness Vernon Branch testified for plaintiff that he was driving plaintiff's automobile on the day in question; that he was going north on the right side of State street, and was about to turn on 33rd street when defendant's truck came right across from the other side of the street, going south at a slant, and struck plaintiff's automobile in front, striking the left front fender, breaking the running board and the bumper, bending the front axle and throwing it out of line, breaking the top and puncturing one tire; that the truck ran about 75 or 80 feet and stopped; that there were two men on the truck; that the driver of the truck gave the witness the number of the truck, city license and chauffeur's license. He says the driver of the truck said to him, "I am awfully sorry, but to avoid killing myself and a few others, I turned over onto the wrong side of the street, to keep from hitting the street car and an automobile that was in front of me." He testified that the driver of the truck handed a paper or card to him with defendant's name on it.

The plaintiff testified that he kept a jewelry store at 3338 State street; that his automobile was a Hudson Roadster Super Six; that on the morning of the accident it was in good condition; that the slip of paper had been handed to him after the accident by his chauffeur. (It is in evidence and the name of the driver of the truck and the number of the truck and the name of the defendant are on it.) Plaintiff said he took this to defendant's place of business at 6255 South Wabash avenue and saw a party there who seemed to be in charge and who said he was one of the

managers; that plaintiff showed him the paper and asked him if the accident had been reported to him; that he answered, "Yes;" that plaintiff asked him what they proposed to do about the matter and he said the insurance company would take care of it and see the damages done were paid for; that plaintiff then said he would let the car stay at the garage for a number of days so they could see it, and the manager said he would send some one down to see it; that the manager said the truck was theirs; that plaintiff then left the automobile in the garage five days; that on July 11th he called the defendant by telephone and the same party he had talked with before came to the 'phone and talked with him again; that he, plaintiff, told him he was sending the car to the Hudson company for repairs and that it could be seen there; that plaintiff sent the automobile to the Hudson company the next day with instructions not to commence any repairs until the agent from defendant had seen it; that the car was with the Hudson company from July until September; that he paid $238.71 for repairs, which was a reasonable sum; that during the months of July, August and September he had occasion to use an automobile in his business, and hired one at three dollars an hour, which was the usual and customary charge; that in July he paid $84., in August $91.50, and in September $96.25 for this purpose.

The driver of the automobile is corroborated as to the manner in which the accident happened by another witness, who evidently saw the same accident, although he placed it on a different day of the month. The driver of the truck testified for defendants, admitting that he gave to the plaintiff's driver the paper produced. He says the automobile passed him and drove right in front of his truck when it was hit. His helper also testifies that the automobile turned in front of the truck; that it came from behind and right alongside and turned right around in front of the truck; that

[illegible] that plaintiff should sit in his place on the other side of the [illegible] had been reported to him; that he remarked, "Yes;" that plaintiff asked him what they proposed to do about the matter and he said the insurance company would take care of it and not the [illegible] then were paid that plaintiff then said he would [illegible] the car step on the garage for a number of days or they would see [illegible], and the manager said he would send some one down to see it; that [illegible] the manager said the block was loosened; that plaintiff then left the [illegible] in the garage after dark; that on this date he called the [illegible] by telephone and the man replied to his talking with [illegible] [illegible] by the "phone and talked only the night; that he, plaintiff, [illegible] to the garage the car to the Indian Company for repairs [illegible] that it would be more fitting; that plaintiff then the [illegible] the Indian company the same day with instructions not to commence [illegible] repairing until the agent first delivered the [illegible] to the [illegible] company from their initial inspection; that on [illegible] [illegible] of the repairs, which was a reasonable one; that during the [illegible] of July, August and September he had occasion to see or be [illegible] in the garage, and filed one of these letters on [illegible], [illegible] the second and [illegible] letter: that in July or [illegible], in August 1921, and in September 1921, in the [illegible].

The defense of the defendants is contributory or in the [illegible] in which the accident happened by reason of [illegible], the [illegible] car was some months, although on plaintiff in a different [illegible] of the month. The letter in her hand [illegible] the [illegible], [illegible] that he gave to the plaintiff's driver the [illegible] [illegible] that the automobile [illegible] not drive which is [illegible] of the [illegible] when it was [illegible]. His letter also [illegible] the [illegible] [illegible] finding in favor of the [illegible] that it came from [illegible] and [illegible] and having right figured in favor of the [illegible] that

it was going 25 miles an hour and the truck about 8 or 10 miles an hour.

There was an attempt to corroborate the testimony of these servants of defendant by the witness Franklin, who lived at 2623 South State street. We have carefully examined all the evidence. It seems to us that the witnesses for the plaintiff tell the more probable story and are corroborated by the facts and circumstances in the case. We cannot say that the finding of negligence against the defendant is clearly and manifestly against the weight of the evidence.

It is next contended that the court erred in excluding proper and competent evidence offered on behalf of defendant. The witness Branch had testified for plaintiff that the automobile was a Hudson roadster. It was claimed that he had signed a statement that it was a "chummy roadster." There is no testimony showing in what respect a "chummy" roadster differs from any other. The supposed written statement is not preserved in the bill of exceptions, and under these circumstances we cannot sustain this point.

It is next said that the damages are excessive in that allowance was made for the use of another automobile with chauffeur during the months of July, August and September, without proof that the repairs were made within a reasonable time. We think there is merit in this contention. We have searched the record and found no evidence tending to show that the automobile was repaired within a reasonable time. The court therefore erred in finding for the plaintiff as to that item of damage. Conrad Co. v. St. Paul C. R. R. Co., 130 Minn. 128. Appellee is entitled, however, to a judgment for the amount paid for repairs, which was shown to be reasonable, viz, $238.71, and upon remitting from the judgment all above that amount, it will be affirmed; otherwise reversed and remanded.

AFFIRMED UPON REMITTITUR.

Dever. P.J.. and McSurely. J.. concur.

222 - 26882 2,882 ~~2710~~

HERMAN NIMPHIUS,
Appellee,

vs.

PEERLESS MACHINERY CO.,
a Corporation, and HERMAN
FREGIN,
Appellants.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In this case the plaintiff took a judgment by confession against the defendant upon a promissory note. The judgment was entered against appellants Peerless Machinery Co. and Herman Fregin. An affidavit was filed in which it was alleged that the note was given without consideration, in this, that the plaintiff was a sales agent for the appellant corporation, under an agreement by which he was to receive a sum of money equivalent to 25 per cent. of such sums as the corporation should receive on orders for its goods taken by the plaintiff, to be paid when the money should be collected by the corporation upon such orders; that defendant had not yet received any money upon such orders, and was not yet entitled to any sum of money on account of such agency; that prior to the execution of the note, plaintiff resigned as such salesman; that orders had, at that time, been received upon which the parties believed that there would become due to the plaintiff the sum of $4360; that plaintiff entreated the corporation to execute a note or notes for such sum; that the corporation thereupon issued five or six notes for that amount; that these were not judgment notes, and were dated to mature at the dates which the parties expected the commission to become due; that, afterwards, at plaintiff's request, the corporation paid $300 thereon as voluntary advancement; that appellant Fregin was president of the corporation; that he was called to the office of plaintiff's attorney and persuaded to sign

the judgment note, upon which judgment was taken; that defendant signed the note upon the representation that judgment would not be confessed thereon; that Fregin signed, but received nothing of value by doing so; that the note sued on was given for other notes evidencing a debt not yet due, but which all parties supposed would become due at a future time.

Upon the filing of this affidavit the judgment by confession was opened up, and leave given defendants to appear and defend and demand a jury trial, the affidavit filed to stand as an affidavit of merits. At the conclusion of the evidence the court directed a verdict for the plaintiff and entered judgment on the verdict, overruling a motion of defendants for a new trial and in arrest of judgment.

Two points are made and argued by appellants. First, that the court directed a verdict before the defendants had rested. By reason of the inadequacy of the abstract we have made an examination of the record and find that at the beginning of the trial the defendants voluntarily assumed the burden of proof with the right to open and close; that they admitted the making and delivery of the note upon which plaintiff's action was based, and that the note was for the amount specified. Thereupon the defendant Fregin was sworn as a witness on behalf of the defendants and testified at length on his original examination. At the conclusion of the original examination he was cross examined at length by the attorney for plaintiff and, plaintiff's attorney having stated, "That is all," was re-examined on direct by the attorney for the defendant, and again cross-examined by attorney for the plaintiff, who, at the conclusion of it again stated, "That is all." Attorney for defendant replied, "That is all." The court thereupon interrogated the witness as follows:

"Q. Going to pay the note in full?
A. I said, 'We are expecting---'
Q. When you said, 'We are going to pay it,' how much of it were you going to pay? All of it?
A. No, I had in mind to pay all of it when we had the money.
The Court: That settles the question, I think."

Whereupon counsel for defendants asked the witness:

"Q. What do you mean, 'when you had the money?'
A. At that time we had all the machinery delivered to the Munn & Bush Shoe Company-----."

Thereupon the court asked counsel to come into his chambers, and the record shows that the court thereupon conferred with counsel out of the hea ing of the jury, and at that time granted a motion made by the plaintiff to instruct the jury to find the issues for the plaintiff. The record does not show that up to this time the defendants made any objection upon the ground that they had other witnesses or that they produced any such witnesses or asked to have them sworn.

The record shows that further proceedings took place in the presence of the jury, at which time the court set forth at length his views of the case and the evidence as submitted; that as the instruction was about to be given the attorney for defendants asked that an objection be noted on the ground that there was at least a one hundred dollar item that should go to the jury, and a further objection also on the ground that the evidence showed want of consideration for these notes. Here again there was no intimation that it was desired to submit further evidence on behalf of defendants. The court again set forth his views at length upon the points raised by defendants, and the attorneys for both sides answered each other pro and con.

In the course of this colloquy attorney for defendants stated:

"There is also another objection, your Honor, our other witnesses have not yet come forward.
The Court: There is already one judgment in this case, and the court wanted to give you an opportunity to come in and present your defense, but I am satisfied if the judge had known what I know now, he would not have given you any leave to come in and

open up this judgment at all. How much was the judgment in this case?
Mr. Hughes: Will the court grant a prayer for an appeal? Make a record in this case?
The Court: He had better go out and pay it. This man can still be prosecuted for giving a check.
Mr. Hughes: That may be true, but will your Honor grant a motion for a new trial?
The Court: He even told this man the day he knew this confession was to be had that if he could hold off for a day or two he would pay it. Now you come in here and tell him not to pay it and spend money to go to the Appellate court.
Mr. Hughes: (To the reporter.) Appeal prayed and allowed, his Honor said.
The Court: No it isn't prayed and allowed yet. Let's have a verdict.
The Court: (Addressing the witness) Q You can sue these people on these claims, can't you, that you got from Milwaukee? Your accounts are good, aren't they?
A. That is not necessary, your Honor, they will pay.
Q. They will pay? A. Yes, sir."

At the conclusion of this colloquy the court said:

"No facts here to justify that. That affidavit isn't true that was made in this case, that there was a failure of consideration; it isn't true, it is a false affidavit, and you really aren't entitled to a jury trial at all."

Thereupon the jury returned a verdict which the court directed to be entered.

"Mr. Hughes: Your Honor, we will stand on the testimony before the Appellate court; if the court please, on behalf of the defendants I move for a new trial."

While there is no doubt that it is a serious error to direct a verdict for plaintiff before the defendant has put in his case, (Miller et al. v. House, 63 Ia. 62, Field et al. v. Olipart, 78 Mich. 26, Murphy v. Kraus, 171 N. W. 326) we think this record fails to show a proper objection by defendants, such as would preserve their rights in this respect. No objection was made on the ground named, prior to the granting of the motion to direct a verdict. There was no presentation of witness nor statement prior to that time, indicating that the defendants had further evidence to offer.

It is also contended that there was sufficient evidence to go to the jury. The evidence for plaintiff is not abstracted,

but we have gone to the record and examined this evidence as well as that of the defendants. The defendants admitted the execution of the note sued on and voluntarily assumed the burden of proof. Not only did the evidence submitted in their behalf fail to establish any valid defense, but on the contrary negatived it. That being the state of the record, the judgment must be affirmed.

AFFIRMED.

Dever, P.J., and McBurnely, J., concur.

235 - 26895

G. A. COPP (Inc.),
a corporation,
Appellee,

vs.

GIDEON A. COPP,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

224 I.A. 634

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree which made permanent a temporary injunction granted upon the filing of the bill of complaint. After the cause was put at issue it was referred to a master in chancery, who took the evidence and reported, overruling objections filed by defendant to his report. The cause was heard before the chancellor on these objections, which were ordered to stand as exceptions, and the exceptions were overruled.

The material facts as alleged in the bill and found by the decree are that the complainant appellee is a corporation organized under the laws of Illinois, having its principal place of business in the City of Chicago; that the defendant appellant on the first day of March, 1917, was engaged in the business of general carpentry and contracting; that his place of business was at No. 821 Rush street; that certain of his employes opened negotiations with him for the purchase of his business and the tools, stock, etc. connected therewith, and that as a result of such negotiations the parties entered into a contract whereby the defendant agreed to sell the business so conducted by him, and the goodwill attached to it, to a corporation, which it was agreed should be thereafter organized, to be known as "G. A. Copp, Inc.," for the purpose of carrying on the business, to

which corporation it was agreed the property should be conveyed. The vendor covenanted and agreed on behalf of himself, his heirs, etc., that the parties of the second part and their successors in the ownership and management of the corporation, should have the right to use the said name during the legal existence of said corporation; that he, himself, would not within two years from April 2, 1917, at any place or location within a radius of three miles from said 821 Rush street, establish a shop or place of business, or become associated with any such shop or place of business for the purpose of doing carpentry work, building contracting, millwork, jobbing carpentry, or any other form of business that he had been carrying on at the premises described. Nor would he solicit, either directly or indirectly, or take business from any person, firm or corporation, then a regular customer, except with the consent of G. A. Copp, Inc. And by a further covenant he agreed to assist in every possible way the said vendees in maintaining the goodwill of said business and retaining the old customers connected therewith, and to cooperate whenever possible with the vendees to enable them successfully to carry on the business.

Pursuant to said contract the appellee corporation was duly organized. After the formation thereof the defendant made, executed and delivered a written bill of sale, in and by which he conveyed "the general carpentry and contracting business, located at 821 Rush street, in the city of Chicago and State of Illinois, now owned by the grantor herein, also including the goodwill attached to said business."

On or about April 2, 1917, the complainant corporation took possession of the premises and the personal property conveyed, and from thence hitherto, has been in possession of the said premises, and continuously maintained and carried on the said

business. Pursuant to the terms of the contract and bill of sale defendant delivered to complainant a list of his customers, announcement was made of the transfer of said business; defendant has received the full consideration mentioned in the contract; the business has increased, the entire goodwill and business of the complainant has become inseparably attached to the corporate name of the complainant; and the goodwill has greatly increased in value since the same was purchased and that said goodwill is necessary to the maintaining of the business, and the prevention of the impairment of the value of the goodwill attached thereto.

On or about May 1, 1919, the said defendant planned to open and maintain under the name of G. A. Copp, a place of business at 885 Rush street, to carry on the business of carpenter and contractor. Before the first day of May, he caused to be mailed to each of the principal customers named in the printed list theretofore delivered to complainant a printed announcement as follows: "G. A. Copp, carpenter and contractor, desires to announce that he will resume business May 1st, 1919, 885 Rush street, phone Superior 522 (after May 1st) where he will be fully equipped to serve his patrons with the same efficiency as in the past. Res phone, Graceland 4704. Remodelling, Repairing Cabinet Work." About the same time he placed a sign in front of the premises at 885 Rush street, reading as follows: "This Building will be occupied by G. A. Copp, carpentry, repairing and alteration metal work, furnace repairing." As a result of these facts confusion has resulted in connection with the business carried on by the complainant, mail intended for the complainant has been delivered to the defendant and vice versa. Customers who desired to secure the services of the complainant have been confused and have given their work to the defendant; said confusion is a direct result of the acts of the defendant in resuming

business under his own name, in making said announcements. The decree finds said confusion results in direct loss and inj ury to the goodwill of the business sold to the complainant, and will continue to have such effect so long as defendant carries on business in his own name in the City of Chicago; that the goodwill and trade name of the complainant is a valuable asset, and that the injury so done to complainant is impossible or exceedingly difficult to measure in dollars and cents, and irreparable, and should be prevented by injunction; that the equities of the cause are with the complainant, and that all the material allegations of the bill are proven and true. It was therefore ordered that the injunction theretofore granted should be made permanent.

By this injunction the defendant was restrained and enjoined from engaging in or carrying on the business of general carpentry and contracting under the name of G. A. Copp, or any other name or style containing the words G. A. Copp, or any part thereof, so similar to the title of G. A. Copp, Inc., as to permit confusion therewith, within the limits of the City of Chicago; that said defendant be further restrained and prohibited from soliciting the old customers of G. A. Copp, Inc., and further from inserting and maintaining either in the general or classified directory of the Chicago Telephone Company or in the general directory of the City of Chicago the name of G. A. Copp, or any other name similar thereto, with the designation attached thereto indicating that the said defendant is engaged in the general carpentry and contracting business, or any other business directly or closely allied therewith.

Further from opening or maintaining the place of business at 885 Rush street in Chicago, under the name of G. A. Copp, or any other name or title containing the words

[illegible]

[illegible] Clark said confusion results in direct loss and injury [illegible] the credit of the business said to the complainant, and [illegible] would continue to have such effect so long as defendant carries [illegible] business in his own name in the City of Chicago; that the [illegible] and trade name of the complainant is a valuable asset, [illegible] that the injury so done to complainant is impossible or [illegible] difficult to measure in dollars and cents, and [illegible], and should be prevented by injunction; that the [illegible] of the cause are with the complainant, and that all [illegible] material allegations of the bill are proven and true. It [illegible] therefore ordered that the injunction theretofore granted [illegible] be made permanent.

By this injunction the defendant was restrained [illegible] and enjoined from engaging in or carrying on the business of [illegible] under the name of E. L. Dyer, [illegible] or any other name or style resembling the name E. L. Dyer, or [illegible] Dyer Shoes, so similar to the title of E. L. Dyer, Inc., [illegible] to permit confusion therewith, within the limits of the City [illegible] Chicago; that said defendant be forever restrained and prohibited from soliciting the old customers of E. L. Dyer, Inc., [illegible] further from instructing and solicitation either in his own [illegible] classified directory of the Chicago Telephone Company or in [illegible] general directory of the City of Chicago the name of E. L. [illegible], or any other name similar thereto, with the instruction [illegible] that the said defendant is enjoined [illegible] the general corporate and manufacturing business, or any other business similar or closely akin thereto.

Further from soliciting or solicitation the place of [illegible] of the Dyer shoes in Chicago, under the name of [illegible]

G. A. Copp, or sufficiently resembling the same to be confused with the corporate title of the complainant, and that the defendant and his employes, generally, should be restrained and prohibited from doing any other act or thing tending in any way to injure, impair or depreciate the value of the goodwill of the business conveyed to the complainant, G. A. Copp, Inc., by said Gideon A. Copp, and from doing any other act or thing calculated or intended to result in unfair competition, etc.

This case was before this court on a former appeal by defendant from an order denying his motion to dissolve the interlocutory injunction, which is by this decree made permanent. Copp, Inc. v. Copp, 216 Ill. App., 622. The motion to dissolve there considered was in the nature of a demurrer to the bill of complaint, and the facts stated in the bill were there taken to be true. These same facts in substance now appear to have been proved on the hearing.

It was there held that the chancellor did not err in refusing to dissolve the injunction, and the view of this court as to the law applicable was there set forth, and was necessary to the decision rendered. We there said:

> "It is the contention of the defendant, appellant here, that because the contract in the case had an express covenant, by which the defendant agreed not to conduct a new business in the neighborhood of the old, for a period of two years, which agreement has expired by its own limitations, the implied covenant that the voluntary vendor of the goodwill may not do anything to lessen the value of the goodwill by solicitation of customers, Trego v. Hunt, 12 Eng. Ruling cases 442, 65 L. J. Chancery. 841; Hanft v. Reimers, 200 Ill., 386; Von Bremen v. MacMonnies, 200 N. Y., 41, 93 N. E. 186, does not obtain, citing Hanna v. Andrews, 50 Ia., 462 and Cottrell v. Babcock Printing Press Co., 54 Conn. 122.
>
> The contract should, if possible, be so construed, as to give effect to all its terms. The intention of the parties, as gathered from the whole instrument must control. Geithman v. Eichler, 205 Ill., 585.
>
> We cannot ignore the other express and affirmative covenants as above set forth, which must, we think, be regarded as additional covenants to the one which is limited to the two year period.

> The principle seems to be well settled that when a party sells an established business with the right to use his own name in connection therewith, he cannot afterwards resume the name in carrying on the same business. Fraser v. Fraser Lubricating Co., 121 Ill. 157; McFall Electric & Telephone Co. v. McFall Electric Company, 110 Ill. App., 182."

The proof and argument of appellant does not indicate that any material fact found by the decree is against the clear and manifest preponderance of the evidence. We are asked to review the case as decided by us on the former appeal. This we may not do. Ogle v. Turpin, 8 Ill. App., 453; Union National Bank v. Post, 93 Ill. App., 339; Garrett v. Pierce, 34 Ill. App., 31; Newberry v. Hatchford, 106 Ill., 584.

Counsel for appellant urges that the injunction as issued is too broad, but do not suggest any modification which would give to complainant the protection to which it is entitled.

The decree is affirmed.

AFFIRMED.

Dever, P. J., and McSurely, J., concur.

The rationale behind is be well settled that when a party relies on statistical evidence with the right to cross-examine the statistical witness, he cannot afterwards assume his name be overlooked on the jury verdicts. Cases v. Cross Contractors Co., 115 Ill. App. 3d 1, 450 N.E.2d 1, 1983. Cases v. Cross Contractors, 115 Ill. App. 3d 1, 1983.

The proof and judgment of application does not satisfy that any evidence that forms the course. In support the claim not analysis presentations of the litigation. It may argue to review the mean on limited by us as the Fewer agency. This as may not be. Cases v. Cross, 115 Ill. App. 3d 1, 1983. Cases Contract Cases v. Cross, 115 Ill. App. 3d 1, 1983. Cases v. Cross, 115 Ill. App. 3d 1, 1983. Cases v. Contract, 115 Ill. App. 3d 1, 1983.

Because the supplying the signs that the assessing of Cases in the Court, but in, not against the artificial which would lead to reasonable the presumption is right if is artificial. The issues is artificial.

CONCLUSION

Cases, 115 Ill. App. 3d 1, 1983.

21722

261 - 26922

JOHN R. THOMPSON CO., a Corporation,
Appellee,

vs.

SAM WEISSMAN,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

224 I.A. 635

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Appellee was plaintiff below and sued defendant in a forcible detainer, claiming that he was entitled to the possession of certain premises, which the defendant unlawfully withheld. The cause was tried by a jury, which returned a verdict finding defendant guilty. Motions for a new trial and in arrest of judgment were overruled, and judgment entered on the verdict.

The plaintiff claimed the right of possession by virtue of a written lease, dated July 28th, 1920, by which the lessor, William Rauen demised the premises in question to plaintiff for a term of five years, beginning September 1, 1920, and ending August 31, 1925. Rauen, the lessor, was the defendant's landlord at this time, the defendant having in the year 1915 entered into possession of these premises, but without a written lease, and holding as a tenant from month to month.

Upon the trial defendant claimed the right to occupancy by virtue of an alleged oral lease, by which he claimed Rauen demised the premises to defendant for a term ending in May, 1921. Whether such oral lease was made was the principal issue of fact on the trial.

Appellant defendant's first contention is that the court admitted improper evidence in that it received in evidence a written notice of termination of the defendant's tenancy, given by Rauen to defendant on the 29th day of July, 1920. This notice

states that defendant's tenancy would terminate on the 31st day of August, 1930. Appellant contends that this notice was not available to the landlord's lessee, the plaintiff. This contention is based on a very strict construction of certain sections of the Landlord and Tenant Act, Hurd's Rev. Stat. 1919, chapter 80, page 1361. Section 6 of that act provides:

> "In all cases of tenancy by the month or for any other term less than one year, where the tenant holds over without special agreement, the landlord shall have the right to terminate the tenancy by thirty days notice in writing, and to maintain an action for forcible detainer or ejectment."

Section 7 provides:

> "Where a tenancy is terminated by notice under either of the two preceding sections, no further demand shall be necessary before bringing a suit under the statute in relation to forcible detainer or ejectment."

Defendant says these sections strictly construed are limited to the landlord alone, and that a lessee of the landlord cannot avail himself of benefits thereunder.

We are unable to see any merit in this contention. The lease by Rauen to plaintiff by its terms was not to begin until September 1, 1930. It transferred to plaintiff no present right to possession of the premises. Rauen was still defendant's landlord. Since the leasehold was one from month to month, it could be terminated only by a notice from Rauen in accordance with the provisions of the statute. If Rauen had failed to give such notice so as to effect a termination of defendant's lease prior to the 1st day of September, he would have been liable to plaintiff in an action for damages. It appearing from the evidence that Weisman was a tenant from month to month, it was necessary to show that his tenancy had been terminated at the time plaintiff's action was begun. For this reason proof of the notice and the service of it were competent, although Rauen was not a party to

the action. And because through service of this notice the estate of defendant was terminated prior to the commencement of the term under plaintiff's lease, no demand was necessary by plaintiff prior to the commencement of its suit. Falkin v. Kunin, 204 Ill. App. 484.

Defendant further contends that the verdict of the jury is against the manifest preponderance of the evidence. The evidence for defendant tended to show that defendant occupied a flat in which he lived, and also the premises here in controversy, which were used for a billiard and pool room; that both places were held without a written lease, but under a tenancy from month to month; that he had so occupied these premises for five years. Defendant says that Rauen came to him early in June (he, Rauen, having previously given notice that the rent would be raised); that the tenants were about to strike and refuse to pay rent, and that Rauen talked with defendant about it, and the witness says, "I said, 'You are raising my rent on the rooms, how do I stand on the store? I would like to know how I stand.' I said, 'The place looks awful, it needs cleaning, I cannot stand any raise on the store.' He said, 'Your rent on your rooms will be five dollars more, but the store will be the same as we got it, $80 a month, and you can stay until next May, and then we will see what we can do then.'" Defendant further says that after this conversation he had his place decorated and paid for the same. He produced a receipt for $90 dated June 19, 1920, showing the payment therefor. The defendant further testified that on the 29th of July thereafter Rauen demanded payment of the rent, for which defendant was then in arrears; that he, defendant, thereupon signed seven notes for the aggregate amount then due of $330, and that he then paid in cash the rent for the store and living rooms, amounting to $113; that after this payment was

made Ramen served the notice upon him, attempting to terminate his tenancy.

The defendant is in part corroborated by a witness named Goldman, who says he was present at the conversation held between defendant and Ramen early in June, when defendant said he could pay more for the flat but not for the store, because business was not good, when Ramen replied, "Well, if that is the case, you can remain here until the end of the year," and Mr. Weissman said, "If that is the case, I will go right ahead and call Mr. Mongerich and I will have the place redecorated." Ramen testified denying this or any other similar conversation. He says that the notes were not given until after a thirty day notice was served, and that, as a matter of fact, defendant at that time thanked him for his leniency in the matter.

The witness Elbert, whose business was to look up locations for the plaintiff company, testifies that he first took up negotiations for this place with the defendant, who told him that he had no lease, but would try and get one from his landlord (this was in July), and that afterwards he met Ramen in Weissman's presence, when Ramen said defendant had no lease. "The only response Mr. Weissman gave me to the question whether he had a lease or not, was that he could get one."

Miss Ramen, the daughter of the landlord, who also worked for her father in his office, testified that the notice was served on Weissman prior to the settlement for the rent by cash and notes.

As defendant claimed under an oral lease, it was for him to establish the fact that such lease was made. Upon this conflicting evidence we cannot say that the verdict is manifestly contrary to the preponderance of it. The judgment is therefore affirmed.

AFFIRMED.

Dever, P.J., and McSurely, J., concur.

26365 91742

192 - 26365

S. KAMPEL,
Appellee,

vs.

BRINK'S CHICAGO CITY EXPRESS COMPANY, a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

224 I.A. 635

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

Plaintiff, a merchant engaged in selling ladies' waists at 1023 Belmont avenue, Chicago, commenced a fourth class tort action against defendant in the Municipal court of Chicago to recover damages for the alleged conversion by defendant of 29 waists of the value of $159.50, claimed to have been delivered to defendant July 18, 1919, to be by it safely carried and delivered to one L. D. Brown, 1022 Medinah Building, Chicago, and which waists never reached said Brown. A trial was had before the court without a jury and, after hearing the evidence introduced by both parties, the court found defendant guilty as charged and assessed plaintiff's damages at the sum of $159.50. Judgment for that amount was entered against defendant and this appeal followed.

On the trial the sole question in dispute was, whether the waists had been delivered to defendant, a carrier for hire, engaged in the express business in Chicago. No question was raised by defendant as to the value of the waists or as to the non-delivery thereof to Brown.

The evidence introduced by plaintiff disclosed in substance the following: On July 18, 1919, plaintiff called on the telephone "Monroe 6109" (defendant's Chicago telephone number) and a woman answered the call, saying "This is Brink's Express Company." Thereupon plaintiff gave his business address and said he had a

package to ship, and the woman at the other end of the wire said, "They will be there tomorrow." On the following day, at a time when plaintiff was not in his store, a man, "dressed like an ordinary workman" and with nothing on his person to indicate that he was in defendant's employ, came into plaintiff's store and said, "Brink's Express, package." Thereupon plaintiff's girl clerk, named Ebbe Johnson, gave the man the package containing the waists, addressed to "L. D. Brown, Medinah building," and he wrote on a piece of plain white paper the following: "7-19-19. 1023 Belmont Store. Pa. 1022 Medina Bldg. (Signed) P. Shick." He then handed the paper to her and left the store with the package. She testified that at the time of the transaction nothing further was said by the man to her and that she did not say anything to him; that she saw a wagon in the street outside on which there was the word "Brink," and that she had never seen the man before or since. There was no testimony introduced by plaintiff showing that the man who came into the store and got the package had previously been on the wagon, or returned to it, or that he put the package on the wagon. Over the objection of defendant the court permitted plaintiff to introduce in evidence, after identification, another paper purporting to be a receipt given by an agent of the defendant on a plain piece of paper for certain goods previously shipped by said Brown to plaintiff, and afterwards received by plaintiff, and which receipt was as follows: "Rec'd of L. D. Brown, 1 Pkg. - consigned to E. Karpel, 1023 Belmont Ave., value $100. (Signed) Benton." This last mentioned receipt, which was not connected in any way with the package of waists in question, was allowed in evidence as tending to show that receipts for goods were sometimes given by agents of defendant on pieces of blank paper, other than the printed blank forms furnished by defendant, and then not signed in the name of defendant, but in the name of the agent only.

The defense on the trial was that the package of waists never came into the possession of defendant or one of its agents. It appears from defendant's evidence that on July 18th and 19th, 1919, a man and not a woman was taking all orders which came over the telephone and that the man wrote all orders so received on the drivers' sheets. All the sheets of the said days were identified and introduced in evidence and on none of them was there shown any order from plaintiff or from his business address to call for a package. Defendant also introduced in evidence a sample book of forms of printed receipts which its drivers are instructed to give to customers. Defendant's evidence also disclosed that on July 18th and 19th, 1919, the only driver on the route that would in the ordinary course of business pick up a package at plaintiff's business address was one William Malkow; that Malkow did not pick up the package in question and did not sign the paper signed in the name of "F. Shick" and never saw the same before its production at the trial; that defendant never had in its employ a driver named "Shick" or one with a name similar thereto; that on said days there was another express company doing business in Chicago, using the name "Brink" and having the words "A. F. Brink" on its wagons and conducting its business under the name of "A. F. Brink Auto Transfer Co.;" and that on all of defendant's wagons at the time were the words "Brink's C. C. Express Co."

Plaintiff alleged a delivery of the package of waists to the defendant as carrier and a conversion of the waists. The burden of proof was on plaintiff to show such delivery. (10 Corpus Juris, sec. 570, p. 371; Markus v. Chicago, Milwaukee & St. Paul Ry. Co., 167 Ill. App. 638, 641). Under the facts disclosed we do not think that a delivery of the package to defendant or to one of its agents was shown. The case is somewhat similar

to that of Abrams v. Platt, 52 N. Y. Supp. 153, where a judgment against the carrier was reversed. In our opinion the judgment appealed from must be reversed and it is so ordered.

REVERSED WITH
FINDING OF FACTS.

Barnes and Merrill, JJ., concur.

FINDING OF FACTS. We find as ultimate facts in this case that the plaintiff, Karpel, did not deliver the package in question to the defendant express company, and that the latter did not convert to its own use the contents of the package.

234 - 26407

JOHN MOVICVIC,
Appellee,

vs.

SANDOVAL ZINC CO.,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

224 I.A. 635

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On November 5, 1919, plaintiff commenced an action in the Circuit Court of Cook County against defendant to recover certain moneys claimed to be due him under a written contract, entered into between the parties on November 4, 1918, whereby defendant agreed to employ plaintiff for a period of one year as superintendent of its blast furnaces at Sandoval, Illinois, and to pay him for his services the sum of $300 per month, and plaintiff agreed to devote his entire time and attention to his duties as such superintendent during the period. On the trial plaintiff testified that he commenced to work as such superintendent on November 10, 1918, and ceased working on October 20, 1919; that for said period of 11 months and 10 days there was due him, at the contract rate, the sum of $3400; that he had received from time to time the total sum of $2700; and that there was a balance due him of $700. Counsel for defendant in their printed argument here filed state that the defendant's defense at the trial proceeded on the theory that the contract for employment was for one year, that plaintiff improperly stopped working before the year had expired, that during the period of his actual employment he absented himself from his work without any cause for two weeks, and that for this period he was not entitled to receive any compensation. The jury returned a verdict finding the issues for plaintiff and assessing plaintiff's damages at $700, (the full amount claimed) and the court entered judgment for that amount against defendant "for wages."

Counsel for defendant urge that the judgment should be reversed because (1) the damages are excessive, and because the court erred (2) in refusing certain instructions offered by defendant, (3) in making certain improper remarks in the presence of the jury, (4) in admitting certain evidence, and (5) in entering the judgment "for wages."

No useful purpose will be served in a discussion of the several points made or of the evidence. Suffice it to say that after an examination of the contract and the evidence we are of the opinion that the judgment should be affirmed for the sum of $560. In other words, that plaintiff should not be allowed to recover for said period of two weeks, viz., 14 days at $10 per day, or $140. As to the judgment being entered "for wages," counsel for plaintiff in his printed argument here filed state that the case was not tried on the theory that plaintiff's claim was for "wages," and that the words "for wages" in the judgment may be treated as surplusage. With these statements we agree.

If the plaintiff (appellee) will, within ten days, file a remittitur in the sum of $140, the judgment will be affirmed for the sum of $560; otherwise it will be reversed and the cause remanded.

AFFIRMED ON REMITTITUR.

Barnes and Morrill, JJ., concur.

[illegible]

Counsel for defendant argue that the judgment should be arrested because (1) the charges are excessive, and because the [illegible] part arts (2) in refusing certain instructions offered by defendant, (3) in making certain improper remarks in the presence of the jury, (4) in admitting certain evidence, and (5) in entering the judgment "for wages."

No useful purpose will be served in a discussion of the several points made as of the evidence. Suffice it to say that after an examination of the contract and the evidence we are of the opinion that the judgment should be affirmed for the sum of $800. In other words, that plaintiff should not be allowed to recover for each period of two months, viz., 24 days at $40 per day, or $240. As to the judgment being entered "for wages," counsel for plaintiff in his printed argument have filed take into the mind was not tried on the theory that plaintiff's claim was for "wages," and that the words "for wages" in the judgment may be treated as surplusage. With these statements we agree.

If the plaintiff [illegible] will, within ten days, file a remittitur in the sum of $240, the judgment will be affirmed for the sum of $800; otherwise it will be reversed and the cause remanded.

AFFIRMED ON REMITTITUR.

[illegible] and Barrill, JJ., concur.

252 - 26425

WILLIAM E. TURNER and
ELLEN M. TURNER, his wife,
Appellees,

vs.

DUNBAR DROP FORGE COMPANY,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

224 I.A. 635

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for $136, rendered by the Municipal Court of Chicago against defendant, April 12, 1920, in a fourth class action in contract tried before a jury, who returned a verdict finding the issues in favor of plaintiffs and assessing their damages at the sum of $236, "of which $100 has been paid."

Certain premises, known as 5222 West Kinzie street, Chicago, were leased to defendant by written lease by one Emilie J. Simmons from February 1, 1919 to January 31, 1920, at a rental of $20 per month, and defendant occupied them as tenant for said period and paid the rent. On December 11, 1919, plaintiffs purchased the premises from Simmons, and she on the same day, in writing on the lease, transferred and assigned to plaintiffs all her interest therein. In the eighth paragraph of the lease it is provided that the lessee, at the termination of the lease, by lapse of time or otherwise, will yield up immediate possession to the lessor, and "failing so to do, to pay as liquidated damages, for the whole time such possession is withheld, the sum of $2 per day." In the tenth paragraph it is stated:

"Tenth. It is further covenanted and agreed, by party of the second part (lessee), that they will replace (without expense to party of the first part) the twelve (horse) stalls in the barn in rear of said premises, on or before the expiration of this lease, (which party of the second part removed shortly after taking possession of said premises), otherwise the sum of $200 is due and payable to the party of the first part within ten days after the expiration of this lease."

Eighteen days after the expiration of the lease, plaintiffs commenced the present action. In their statement of claim, after mentioning various provisions of the lease, the occupation of the premises by defendant, the transfer of the title to plaintiffs and the assignment of the lease to them, it is alleged that the defendant has not delivered up possession of the premises but still has its goods stored thereon, and that under paragraph eighth of the lease they are entitled to recover from defendant $2 per day from January 31, 1920, or $36; that defendant has not replaced the stalls, or any part thereof, mentioned in paragraph tenth of the lease, and that therefore plaintiffs are entitled to recover from defendant the further sum of $200; and that their total claim against defendant is $236.

In its affidavit of merits, filed March 6, 1920, the defendant alleged that it has a good defense to all of plaintiff's demand except the sum of $100; that by the terms of said lease defendant had the option to replace the horse stalls or to pay plaintiffs $200; that defendant elected to exercise its option to replace the stalls; that plaintiffs desired that the stalls be not replaced; that prior to the expiration of the lease the parties "agreed that defendant would not exercise its option to replace the horse stalls and would give plaintiffs $100 in consideration that plaintiffs would accept the said relinquishment of option and $100 in full satisfaction of their rights in respect to the said replacement;" that defendant has offered and has continued to offer to plaintiffs $100 in accordance with

said agreement, but plaintiff has refused to accept the same, and that defendant has not exercised its option to replace the stalls and has relinquished said option; and that defendant denies that it has not delivered up possession of the premises to plaintiffs, and denies that after January 31, 1920, it had any of its goods or property stored on the premises.

On March 10, 1920, on motion of plaintiffs, the court entered judgment against defendant for $100, the amount confessed to be due plaintiffs in said affidavit of merits, and the court reserved for future determination the matter of the balance of plaintiffs' demand. Subsequently defendant paid the judgment for $100.

The cause as to said balance of plaintiffs' claim was called for trial on April 12, 1920. The lease was introduced in evidence, and W. T. Turner testified for plaintiffs and Harry A. Harris, vice president of defendant, testified in its behalf. Certain letters and writings were also introduced.

It appears that on January 20, 1920, W. T. Turner wrote defendant, calling attention to the expiration of the lease on January 31st, and stating that "he would like to have the rest of the material and machinery, if any, removed by above date," and also that he "would like to know if you wish to take advantage of the option of replacing stalls." Harris testified in substance that after the receipt of said letter and about January 27, 1920, he called on Turner at the latter's place of business and had a conversation with him; that Turner said that plaintiffs "didn't intend to use that place as a stable and would rather have the money instead of the stalls;" that after some talk as to the probable cost of replacing the stalls it was agreed that defendant would pay plaintiffs $100 in lieu of replacing the stalls; that after this matter "was straightened

out" they went over to the premises in question; that there were certain goods and machinery still remaining in the barn or shed, which he (Harris) said were not the property of defendant but belonged to a separate corporation, the Dunbar Mnfg. Co., and that he would notify that company to immediately remove the same. Turner testified in substance that at this conversation he told Harris that if defendant did not replace the stalls "he would accept $100 in settlement;" that after he and Harris had gone over to the premises he (Turner) called Harris' attention to certain machinery, shafting and forgings which were piled in the barn or shed, and to certain rods, and requested him to remove them; that Harris said that these belonged to another company but that defendant "would see that they were removed;" and that plaintiffs "finally agreed, to avoid this trouble, to accept $100 for a ful. settlement of the lease proposition and the clauses as it were in the lease." It further appears from the testimony that about January 31st, defendant presented a check for $100 to Turner, together with a form of release drafted by defendant's attorney for plaintiffs' signatures. Turner refused to sign the paper because it provided in substance for a general release of defendant from all claims that had arisen or might arise because of any and all covenants in the lease, instead of being limited to the covenant as to the stalls, regarding which the verbal agreement had been made. Because of Turner's refusal defendant did not give plaintiffs the $100 check. After some further negotiations plaintiffs brought the present action on February 18, 1920. It further appears that the machinery mentioned was not removed from the premises until February 6, 1920, and that certain rods and goods were not removed until March 25, 1920.

As to that portion of plaintiffs' claim arising under the tenth paragraph of the lease, we think that the evidence

clearly shows that the parties by a verbal agreement, made prior to the expiration of the lease, agreed upon a settlement of defendant's option on the basis $100 to be paid by defendant. Counsel for plaintiffs in his printed argument here filed admit that it is the law that covenants in a sealed instrument may be waived by a subsequent parol agreement. In our opinion, under the facts and circumstances disclosed, plaintiffs are estopped to claim that defendant is indebted to them in the sum of $200 (less payment of the $100) by virtue of the provisions of said tenth paragraph. (See Moses v. Loomis, 156 Ill. 392; Dauchy Iron Works v. Toles, 76 Ill. App. 669; Pierce v. Powers, 180 Ill. App. 687.)

As to plaintiffs' claim for $36 arising under the eighth paragraph of the lease, we do not think that the evidence discloses any withholding of the premises by defendant after the expiration of the lease on January 31, 1920. Apparently the possession was yielded up to plaintiffs on or before said date. While it appears that certain machinery and goods belonging to a corporation other than the defendant remained on the premises subsequent to that date, we do not think that under the language of said paragraph of the lease plaintiffs were entitled to any sum as liquidated damages.

Our conclusion is that the judgment for $136 against defendant should be reversed, and it is so ordered.

REVERSED WITH FINDING OF FACTS.

Barnes and Morrill, JJ., concur.

252 - 26425

FINDING OF FACTS.

We find as ultimate facts in this case that the defendant did not withhold the possession of the premises from plaintiffs after January 31, 1920, and that plaintiffs before the expiration of the lease verbally agreed with defendant to waive the provisions of paragraph tenth of the lease on payment by defendant of the sum of $100, which sum plaintiffs have received.

26482

308 - 26482

IN RE ESTATE OF WILLIAM R. ANDERSON, Deceased.

FRANCES M. GIVENS,
Claimant and Appellee,

vs.

GEORGE F. ANDERSON, Administrator of said Estate,
Appellant.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

224 I.A. 635

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

Frances M. Givens filed her claim against said estate in the Probate court of Cook County as follows: "William R. Anderson to Frances M. Givens, Dr. To money borrowed from Frances M. Givens, $1000." The claim was sworn to on March 30, 1918, as being just and unpaid. On June 11, 1919, the Probate court after hearing evidence disallowed the claim, and an appeal was perfected to the Circuit court where on June 24, 1920, a trial was had before a jury, resulting in a verdict finding the issues for the claimant and assessing her damages at $1000, together with interest at 5% from date of the loan. Judgment was entered upon the verdict against the administrator, to be paid in due course of administration, and this appeal followed.

Counsel for the administrator here contend (1) that the verdict is against the weight of the evidence, and (2) that the trial court erred in giving certain instructions offered by the claimant.

After a careful review of the evidence we are unable to say that the verdict is so manifestly against the weight of the evidence as to warrant a reversal on that ground. There is a sharp conflict on the question whether the money claimed to have been

loaned was loaned to the decedent. However, as we have reached the conclusion that the judgment should be reversed and a new trial had because of error in giving certain instructions offered by the claimant, we refrain from a discussion of the testimony of the several witnesses.

There are some noticeable repetitions in the first three of the five given instructions offered by the claimant and the second and third instructions do not correctly state the law. The three instructions are all to the effect that if the jury believes from the evidence that any witness has sworn falsely as to any material fact in the case, they are at liberty to disregard his entire testimony, etc. In the second instruction it is stated that "if the jury believes that any witness has wilfully sworn falsely as to any material fact in the case, they may disregard the whole of the evidence of any such witness, unless corroborated by other credible evidence." In the third instruction it is stated that "if upon consideration of all the evidence, you conclude that any witness has sworn wilfully and falsely as to any material matter involved in the trial, you may reject or treat as untrue the whole or any part of such witness' testimony, unless corroborated by other substantial evidence." If a material part of a witness' testimony is corroborated by facts and circumstances in evidence, we do not understand it to be the law that the jury can totally disregard it, even though they believe that such witness has wilfully sworn falsely to any other material fact in the case. Furthermore, the repetitions contained in these instructions were calculated to emphasize certain so-called impeaching testimony as to a statement made by George F. Anderson on what we deem to be an immaterial point. And we think that the fourth given instruction offered by the claimant is so worded as to be misleading. In our opinion, under the state of the evidence the giving of these

instructions constituted prejudicial error.

For the reasons indicated the judgment of the circuit court is reversed and the cause remanded.

REVERSED AND REMANDED.

Barnes, J., concurs. Morrill, J., took no part in the decision of this case.

351 - 26525

ANNA MAY,
Appellee,

vs.

DWIGHT L. NASH,
Appellant.

APPEAL FROM
COUNTY COURT,
COOK COUNTY.

224 I.A. 636

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On October 3, 1919, plaintiff commenced an action of trover in said County court against defendant, alleging in her declaration that on, to-wit: June 12, 1919, she was lawfully possessed of a certain mink cape of the value of $1000, which she casually lost and which came into defendant's possession by finding, and that defendant afterwards converted the cape to his own use, to her damage, etc. The defendant filed a plea of the general issue. On the trial before a jury a verdict was returned finding the defendant guilty and assessing plaintiff's damages at $200. On April 3, 1920, judgment was entered on the finding against defendant and he appealed.

The facts as disclosed from the evidence are in substance as follows: Defendant is engaged in the business of selling fur coats, capes, etc., at 115 South Dearborn street, Chicago. About August 23, 1918, plaintiff called at defendant's shop, examined several fur wraps and picked out the cape in question, the price of which was $350. She then telephoned her husband, Peter May, about the matter and he came to the shop and approved her selection. Some talk was had about the husband paying for the cape in installments, about his signing a conditional sales contract, and about his desire to give the cape to plaintiff as a birthday present. He made a deposit of $50 on the cape. A contract was drafted by defendant and afterwards signed by him, designated as the "seller," and by Peter May, designated as the "buyer." It bore the date

of August 23, 1918, but was not signed by plaintiff. It provided in substance that Mr. May should pay defendant the sum of $50 on the execution of the contract (this he had already done), and $200 on the date of the delivery of the cape to him and $100 in 90 days thereafter, and that the right of property in the cape should remain in defendant until the entire purchase price ($350) had been paid. Other payments were made from time to time thereafter by Mr. May, and plaintiff several times called on defendant and he had it altered to make it properly fit her. On September 28, 1918, when the total payments made to defendant amounted to the sum of $250, defendant delivered the cape to Mr. May, and he gave it to plaintiff, and she wore it, and it remained continuously in her possession until taken away from her as hereinafter stated. When the remaining $100 became due under the terms of the contract, defendant made unsuccessful efforts to procure further payments from Mr. May. After negotiations, defendant accepted Mr. May's note, payable at a future date, to the amount of the balance due on the contract. Mr. May did not pay the note when it matured, and in January, 1919, defendant brought suit thereon in the Municipal Court, obtained judgment against Mr. May alone, caused an execution to issue and garnisheed Mr. May's employer. No money was collected on this judgment. In May, 1919, defendant commenced an action in detinue in the Municipal Court against Mr. May alone, obtained judgment for the cape, and for damages for detention in the sum of $136, against him, and caused an execution to issue. Under that execution the bailiff of said court, attended personally by defendant, took the cape from plaintiff, while in her personal possession and against her protests, on June 12, 1919, and turned the cape over to defendant. Plaintiff made demand on defendant for the return of the cape to her but the demand was refused. In August, 1919, defendant, prior to the commencement of the present

action, sold the cape, though to whom and for what amount does not appear.

The net result of the transactions and happenings as above outlined are substantially as follows: Defendant has the $250 in cash which he received from Mr. May before the cape was first delivered to the latter; he also has the proceeds received from the sale of the cape in August 1919; he also has a judgment against Mr. May for more than $100 on the latter's note given for the balance of the purchase price of the cape, which judgment is not satisfied of record; he also has a judgment, unsatisfied of record, in the detinue action against Mr. May for damages in the sum of $136; and plaintiff is no longer in the possession of the cape, which was given to her by Mr. May, with defendant's knowledge and apparent consent, after the former had paid more than two-thirds of the purchase price.

On September 28, 1918, or shortly thereafter, plaintiff became the owner of the cape and it remained in her exclusive possession until taken away from her as shown. She did not sign the conditional sales contract. She did not agree that the right of property should remain in defendant until the entire $350 had been paid. She was not made a party to the detinue action and the judgment rendered thereon is not <u>res adjudicata</u> as to her. Even assuming that her possession of the cape was subject to the provisions of the contract which Mr. May signed, defendant abandoned his right of property in the cape, under said contract, when he accepted Mr. May's note for the balance due on the purchase price. The note amounted to payment of such balance, and defendant's acceptance of the note amounted to an election on his part to treat the sale of the cape as absolute. Such election is further evidenced by his bringing suit on the note and obtaining a judgment against Mr. May alone. "Where, on the sale and delivery of personal property on credit, the title is to

tion, said the cape, though to whom and for what reason does
not appear.

The net result of the transactions and happenings as
here written are substantially as follows: Mabelbond has the
CAD is such which he received from Mr. Guy before the cape was
first delivered to the Jackery; he also has the proceeds received
from the sale of the cape in August 1919; he also has a pledgeat
plaint Mr. Guy for some time CAD on the latter's note given
for the balance of the purchase price of the cape, which pledge-
ment is not satisfied of record; he also had a judgment, not
satisfied of record, in the Chelsea action against Mr. Guy for
damages in the sum of $180; and finally it is longer in the
possession of the cape, which was given to her by Mr. Guy, with
defendant's knowledge and apparent consent, after the former had
had more than two-thirds of the purchase price.

On September 20, 1920, or shortly thereafter, plaintiff
became the owner of the cape and it remained in her possession
continuously until taken away from her by the sheriff. The sale and plea
of conditional sales contract, the trial court ruled the right
of property should remain in defendant until the entire from
had been paid. The lot not make a profit in the Chelsea action
and the judgment rendered thereon is not yet satisfied in fa
vor. Even assuming that her possession of the cape was subject
to the provisions of the contract which Mr. Guy signed, plaintiff
contended his rights of property in the cape, under all circumstances,
can be analyzed Mr. Guy's note for the balance due on the pur-
chase price. The note amounted to payment of such balance, and
defendant's acceptance of the note constituted in an election on his
part to treat the sale of the cape as absolute. Such election
is further evidenced by his bringing suit on the note and ob-
taining a judgment against Mr. Guy alone. Where, as the sale

remain in the vendor until payment, the vendor, upon the non-compliance with the conditions of sale by the vendee, may either retake the property or may treat the sale as absolute and bring an action for the price, but the assertion of either right is an abandonment of the other. (6 Am. & Eng. Ency. Law, 2nd Ed., p. 480.)

Under the facts disclosed, we are of the opinion that defendant unlawfully converted to his own use the cape, of which plaintiff was the owner and entitled to possession, and that the jury were fully warranted in returning the verdict they did. Complaint is made of the giving of certain instructions offered by plaintiff. We have examined them and do not think that any error was committed by the court in this particular.

The judgment of the County Court is affirmed.

AFFIRMED.

Barnes and Morrill, JJ., concur.

[illegible] in the sender until payment, the vendor, upon the non-
compliance with the conditions of sale by the vendee, may either
retake the property or may treat the sale as absolute and bring
an action for the price, but the assertion of either right is
an abandonment of the other. (6 Am. & Eng. Ency. Law, 2nd Ed.,
p. 480.)

Under the facts disclosed, we are of the opinion
that defendant unlawfully converted to his own use the cups,
of which plaintiff was the owner and entitled to possession.
We think the jury were fairly warranted in rendering the verdict
they did. Complaint is made of the giving of certain instructions
offered by plaintiff. We have examined them and do not think
that any error was committed by the court in this particular.

The judgment of the County Court is affirmed.

AFFIRMED.

Brown and Barrett, JJ., concur.

403 - 26577

MORRIS H. WEIRD,
Appellee,

vs.

LIBERTY DAIRY PRODUCTS CO.,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

224 I.A. 236

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

Plaintiff commenced an action of the fourth class in contract in the Municipal court of Chicago against defendant to recover the sum of $57.10 which he claimed was due him for wages for ten days work as a driver of one of defendant's milk wagons, and also to recover the sum of $100, which he had deposited with defendant as security. On the trial before a jury plaintiff testified in his own behalf and called the secretary of the defendant as a witness under section 33 of the Municipal Court Act. Three witnesses testified for defendant. The jury returned a verdict against defendant and assessed plaintiff's damages at the sum of $157.10, and the court entered judgment against defendant for that amount "for wages due plaintiff as a laborer." Defendant appealed.

It appears that about July 20, 1920, plaintiff applied to defendant for work as a driver and was given the opportunity of qualifying himself to become a driver on a wagon over a certain route, by going with an experienced driver of defendant. He accompanied this driver in the wagon over the route for a period of about a week. He did not inquire in advance what his week's wages would be while engaged in this preliminary work. About the second trip he inquired of the driver what wages he would get and was informed that he would not get more than $5.00 for the first week, whereupon he said that if that was all he would get he would quit, but he did not quit. About July 29th he was told that he would

be hired as a regular driver over said route and would thereafter receive the regular wages paid other drivers, and he deposited with defendant at its request the sum of $100 as security. Thereafter he drove a wagon alone for one day, when he suddenly ceased working for defendant. He demanded the return of his deposit and also wages. Defendant tendered him the sum of $110 - $100 for his deposit and $10 for his said week's work with the other driver and for the one day's work when he alone drove a wagon. He refused the tender and commenced the present action. Defendant at the opening of the trial renewed the tender and it was again refused.

We think that the amount awarded plaintiff by the jury is excessive. Clearly, under the facts disclosed, he is not entitled to recover more than the sum of $110. The judgment entered for $157.10 "for wages due plaintiff as a laborer" is, of course, erroneous, as $100 of the amount is not for wages. These words in the judgment, however, can and should be treated as surplusage.

If the plaintiff (appellee) within ten days will file a remittitur in the amount of $47.10, the judgment will be affirmed for the sum of $110; otherwise it will be reversed and the cause remanded.

AFFIRMED ON REMITTITUR.

Barnes and Morrill, JJ., concur.

119 - 26286

THE EMPLOYERS LIABILITY ASSURANCE CORPORATION, LIMITED, OF LONDON, ENGLAND,
Appellee,

vs.

GEORGE T. HORTON, HORACE B. HORTON, HIRAM T. HORTON, JESSIE HORTON KOESSLER and SUE HORTON MURRAY,
Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is a suit for the unpaid balance of the premium upon a policy of Workmen's Compensation Insurance issued by appellee for appellants for the term of one year. The facts were stipulated to and the cause heard without a jury.

The sole question presented was upon what basis should the rate of premium be computed for the period while the policy was in force, it having been cancelled at the end of six months in accordance with a provision therefor in the policy, and both parties having complied with its provisions.

The policy provides that the rate of premium shall be $17.41 upon each $100 of the employer's payroll, "based upon the entire remumeration earned during the period of the policy by all employes of the employer," but that in case of its cancellation, at the employer's request and he is not retiring from business, as are the facts here, "the earned premiums shall be computed upon the basis of the remuneration to the date of cancellation;" and that it "shall be computed and adjusted at short rates in accordance with the table" printed on the policy.

As fixed by that table the earned premium for six months is 70 per cent of the earned premium for one year. The

THE EMPLOYERS LIABILITY
ASSURANCE CORPORATION,
LIMITED, OF LONDON, ENGLAND,
Appellee,

vs.

GEORGE T. BOLTON, HORACE E.
BOWYER, HIRAM T. MORTON,
FRANK EDSON WOODSUM and
ALFRED HUNTON MURRAY,
Appellants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

22956

MR. JUSTICE MACNEAL DELIVERED THE OPINION OF THE COURT.

This is a suit for the unpaid balance of the premium upon a policy of workmen's compensation insurance issued by appellee for appellants for the term of one year. The facts were stipulated to and the cause heard without a jury.

The sole question presented was upon what basis should the rate of premium be computed for the period while the policy was in force, it having been cancelled at the end of six months in accordance with a provision therefor in the policy, and both parties having complied with its provisions.

The policy provides that the rate of premium shall be fixed upon each $100 of the employee's payroll, "based upon the entire remuneration earned during the period of the policy by all employees of the employer," but that in case of its cancellation, at the employer's request and he is not retiring from business, as are the facts here, "the earned premium shall be computed upon the basis of the remuneration to the date of cancellation;" and that it "shall be computed and adjusted at short rates in accordance with the table" printed on the policy.

As fixed by that table the earned premium for six months is 70 per cent of the earned premium for one year. The

payroll or remuneration to employes for said six months was $13,074.62. Computed on that basis for one year as we think should, under the clause of the policy above quoted, be done, the estimated payroll for one year would be $26,149.24. At $17.41 per $100 the premium thereon for one year would be $4,552.55, and for six months would be 70% thereof, $3,186.78, according to the short rate table.

This was the method of computation adopted by the court, and after deducting $971.94, the amount appellants had paid on the policy, the court gave judgment for the balance, $2214.84 with interest.

We concur in this construction of the policy, and do not agree with appellants' claim, that the terms of the policy are uncertain or ambiguous with respect to the method of computation to be applied in case of cancellation.

Appellants contend, however, that whatever construction be given to the policy in this respect its terms were modified by appellee's letter accompanying its transmission. In this we cannot concur. After preliminary negotiations were had about the policy, at which no definite agreement was apparently reached, appellee transmitted the policy in question to appellants with a letter explaining certain provisions of the policy, and saying that if appellants desired appellee would make broader specifications, and the letter concluded with these words: "If after consideration you are not prepared to continue this policy you may return it and pay at the policy rate for the time it has been in force.

Appellants construe these words as giving them the benefit of the annual rate of $17.41 per $100 of the payroll for such time as they might see fit to keep the policy. The clear import of the letter is that the policy was sent to

payroll or remuneration to employes for said six months was $13,074.82. Computed on that basis for one year as we think should, under the clause of the policy above quoted, be done, the estimated payroll for one year would be $26,149.64. At $17.41 per $100 the premium thereon for one year would be $4,552.51, and for six months would be 70% thereof, $3,186.76, according to the short rate table.

This was the method of computation adopted by the court, and after deducting $971.94, the amount appellants had paid on the policy, the court gave judgment for the balance, $2214.84 with interest.

We concur in this construction of the policy, and do not agree with appellants' claim, that the terms of the policy are uncertain or ambiguous with respect to the method of computation to be applied in case of cancellation.

Appellants contend, however, that whatever construction be given to the policy in this respect its terms were modified by appellee's letter accompanying its transmission. In this we cannot concur. After preliminary negotiations were had about the policy, at which no definite agreement was apparently reached, appellee transmitted the policy in question to appellants with a letter explaining certain provisions of the policy, and saying that if appellants desired appellee would make broader specifications, and the letter concludes with these words: "If after consideration you are not pleased to continue this policy you may return it and pay at the policy rate for the time it has been in force."

Appellants construe those words as giving them the privilege at the annual rate of $17.41 per $100 of the payroll for such time as they might see fit to keep the policy. The direct import of the letter is that the policy was sent to

appellants to consider whether they would accept or "continue" it in that form, and if they decided not to that then they should return it, receiving the benefit of insurance protection in the meantime. The letter specified no time for such consideration but manifestly contemplated a reasonable time. This interpretation is harmonious with other parts of the letter stating appellee's willingness to change and broaden the specifications of the policy if appellants so desired. If appellants wanted them changed they were to return the policy, otherwise it would be presumed acceptable and in force according to its express provisions. Any other interpretation would render a great part of the policy meaningless and nugatory, especially the provisions pertaining to cancellation and adjustment of premium in that event. If these provisions were not to have force they unquestionably would have been eliminated from the policy. The most natural interpretation therefore is that appellee intended to give appellants the option to accept the policy or to return it within a reasonable time, allowing them the benefit of insurance at the annual rate while taking the matter under consideration in case they chose not to accept it. As appellants did not return the policy but kept it, made payments on it, had audits and received benefits under it, and complied with its terms in every other respect, they cannot consistently urge an interpretation of the letter that would nullify many of the policy's most important provisions, some of which they acted under.

We think the judgment should be affirmed, and as appellants failed to abstract enough of the record from which to decide the points argued, necessitating appellee's filing an additional abstract, the latter will be taxed against them.

AFFIRMED.

Gridley, P. J., and Morrill, J., concur.

appellants to consider whether they would accept or "continue" it in that form, and if they decided not to that then they should return it, receiving the benefit of insurance protection in the meantime. The letter specified no time for such consideration but manifestly contemplated a reasonable time. This interpretation is harmonious with other parts of the letter stating appellee's willingness to change and broaden the specifications of the policy if appellants so desired. If appellants wanted them changed they were to return the policy, otherwise it would be presumed acceptable and in force according to its express provisions. Any other interpretation would render a great part of the policy meaningless and nugatory, especially the provisions pertaining to cancellation and adjustment of premium in that event. If these provisions were not to have force they unquestionably would have been eliminated from the policy. The most natural interpretation therefore is that appellee intended to give appellants the option to accept the policy or to return it within a reasonable time, allowing them the benefit of insurance at the annual rate while taking the matter under consideration in case they chose not to accept it. As appellants did not return the policy but kept it, made payments on it, had audits and received benefits under it, and complied with its terms in every other respect, they cannot consistently urge an interpretation of the letter that would nullify each of the policy's most important provisions, some of which they acted under.

We think the judgment should be affirmed, and as appellants failed to advance enough of the record from which to decide the points argued, necessitating appellee's filing an additional abstract, the costs will be taxed against them.

AFFIRMED.

148 - 26316

JOHN BAIN, administrator of the estate of JOHN D. HUFFMAN, deceased,
Defendant in Error,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

224 I.A. 636

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Defendant in error was substituted as plaintiff below, John D. Huffman, original plaintiff, having died during the pendency of the suit. The action was based on an alleged breach of contract entered into by said Huffman with the defendant, the C. M. & St. P. Ry Co., for the shipment of five cars of steers from South St. Paul, Minn., to Indianapolis, Ind., with the privilege of forwarding to Lancaster, Pa. The railroad company denied that such was the contract. On a trial had without a jury the finding and judgment were for plaintiff in the sum of $889.61 as damages.

October 4, 1915, Huffman, through his agent H. H. Hutcheson, purchased at South St. Paul Union Stock Yards 142 steers, and to see to their shipment went to the "joint office" of the railroad companies shipping out of said yards, including the defendant company, where he received instructions from a clerk in the office to go to the office of the St. Paul Union Stock Yards Company, some four or five blocks away, to order the cars. Going there he told a clerk at the latter office that he wanted the cattle stopped for feed and water at Milwaukee and Indianapolis with privilege of forwarding from the latter point to Lancaster, and to be billed in care of

Graves-Nave Company, Indianapolis, for account of G. B. Huffman, who would be in Indianapolis to receive them. After the clerk made out the bill Hutcheson asked if he was sure that he "got that right," to which the clerk replied: "Yes, sir, very correct and they will be stopped at Indianapolis, and Graves-Nave Co., can get them." Taking his word that the order was in due form Hutcheson, having never ordered from there before, and relying on the clerk's word and his presumed acquaintanceship with his duties and the forms of such orders, he signed the bill and then went to the railroad office where he signed in blank a live stock contract handed to him by a clerk in that office, the latter saying that the blank would be filled out according to the shipping instructions he had given at the yards office.

The order signed at the yards office was designated as a combined shipping and car order. It was dated October 4, 1915, and directs the yards company to deliver to the C. M. & St. P. Ry. Co., at South St. Paul to be forwarded subject to classifications, etc., live stock in its yards described as "stock steers" to be consigned to G. B. Huffman c/o Graves-Nave Co., Lancaster, Pa. It calls for two cars and for a "stop at Milwaukee, Wis., for feed, and at Indianapolis, Ind.," and routing via junction with Penn. Ry. It is signed J. D. Huffman, shipper, by H. H. H.

The order for the three cars is similar in every way to the last described order except that it was dated October 5, called for three cars and was signed in Huffman's name by an employe of Hutcheson's, acting under his directions.

None of these facts is disputed. The cars did not go to Indianapolis but after leaving Milwaukee by another route went direct to Lancaster.

Hutcheson wired G. B. Huffman to go from Pittsburgh, Pa., to Indianapolis to meet and sell the cattle there. After

Ferris-Iron Company, Indianapolis, for account of G. E. Mellman.
You would be in Indianapolis to receive them. After the clerk
has put the will Mellmann asked if he was sure that he
right," he added the clerk replied: "Yes, sir, very sorry
but they will be shipped to Indianapolis, our Grover-Bass Co.,
can get them." Taking his word that the order was in due form
Mellmann, having never ordered from them before, and relying
on the clerk's word and his personal acquaintanceship with his
father and the form of such orders, he signed the bill and then
went to the railroad office where he signed in blank a live stock
contract handed to him by a clerk in that office, the latter
replied that the blank would be filled out according to the
shipping instructions he had given at the Grove office.

The order signed at the Grove office was transmitted to
Grover-Bass Company and our order. It was dated October 4, 1921,
and directed the Grove Company to deliver to the C. B. & Q. R.
R. Co., at South St. Paul is to forwarded subject to diversification
instructions, etc., live stock in the Grove checkbook as "stock received"
and be consigned to G. E. Mellman c/o Grover-Bass Co., Lessee,
etc. It calls for two cars and for a "stop at Milwaukee, Co.,
for feed, and at Indianapolis, Ind.," and routing via Burlington
with rates. Cy. It is signed G. E. Mellman, shipper, by E. E.
The order for the Grove cars is similar in every way
to the last described order except that it was issued October 5,
called for three cars and was signed in Mellman's name by an
employee of Mellmann's, noting under his direction.

Two of these funds is disputed. The cars did not go
to Indianapolis but after January Mellmann by another route
had livery in Lessee-Grover.

Mellmann sued G. E. Mellman in a Cook Milwaukee,

waiting there for some time and endeavoring to locate the cars G. B. Huffman learned that the cars had gone another route and that two of them were in Pittsburgh and that three of them had reached Lancaster. He returned to Pittsburgh, took deliveries under protest, wired a commission firm at Lancaster to sell the five carloads to the best advantage, the steers at Pittsburgh not being salable there. The commission firm sold, as appears, at the best available prices.

The court allowed $302.87 as damages for extra feeding charges, selling costs and excess freight, the items of which were not disputed. The rest of the judgment, $597.74, was for the difference between the market prices at Indianapolis when the cars should have reached there, and the prices obtained at Lancaster.

The first question presented and argued is what was the contract? Was it verbal, as claimed by defendant in error, or were the verbal arrangements merged into the written live stock contracts, as claimed by plaintiff in error? The court refused to receive the latter in evidence on the theory that they were signed by the shipper in blank only upon assurance that they would be filled out according to the instructions that had been given at the yards office with respect to shipment, and that as they were not so filled out the writing did not express the contract between the parties. In fact, its holding was that the signing of the live stock contracts in blank was conditional and upon the distinct understanding that they would embody the shipper's previous instructions given at the place where he was directed to give them, and that if they did not embody these they did not represent a meeting of the minds of the parties, and hence were nugatory and the same as if they

[illegible] there for some time and endeavoring to locate the cars. B. Hoffman learned that the cars had gone another route and that two of them were in Pittsburgh and that three of them had returned Lawrence. He returned to Pittsburgh, took delivery of their property, hired a transportation firm at Lawrence to haul the five vehicles to its yard adjacent, the frame at Pittsburgh and paying reasonable charge. The transportation firm made, in addition, at the best available prices.

The court allowed $202.67 as damages for extra freight charges, selling costs and excess fuel, the items of which were not disputed. The rest of the judgment, $997.74, was for the difference between the market prices at Indianapolis when the cars should have reached them, and the prices obtained at Lawrence.

The first question presented and argued is that the [illegible] the contract. For it appears, as claimed by defendant it appears, the verbal arrangements making part the written [illegible] contracts, as claimed by plaintiff is proper. The court refused to receive the latter as evidence on the theory that they were added by the shipper in their only some minutes after they would be filled out according to the instructions and had been given at the yards office with instructions to ship, and that as they were not so filled out the writing did not represent the contract between the parties. In fact, it included [illegible] the signing of the first usual contracts in blank was authorized and upon the filling out representative that very was [illegible] the shipper's previous instructions given at the time [illegible] to give them, and that if they did not [illegible] there they did not represent a meeting of the minds of the parties, and hence were delivered and the same as if they

had never been signed, and that the contract, therefore, rested in the verbal arrangements. We think the undisputed facts and circumstances warranted this construction and that therefore proof of the oral agreement did not contravene the rule that parol evidence is not admissible to vary or change the terms of a written contract.

But defendant contended that the yards company was plaintiff's and not its agent. Testimony on this subject is not denied. It fully supports the theory that the yards company was held out and acted as the agent for the railroad companies in taking shipping orders and instructions for cars and routes from the South St. Paul union yards. Hutcheson's testimony with regard to the instructions given was not denied and is fully supported by other facts and circumstances. One of the order bills consigns to the Graven-Hare Co., at Lancaster, and the other to G. B. Huffman at Lancaster. Neither party had an office or place of business at Lancaster. The former had an office at Indianapolis and G. B. Huffman was to and did go there to sell the steers. These circumstances corroborate the testimony of Hutcheson as to the instructions given as to the point of delivery, and it appears that it was a customary practice at that time for shippers to obtain the privilege to forward to the Lancaster market if they could not sell to advantage in Indianapolis. No copy of either of the orders or of the live stock contracts was given to the shipper.

We think therefore that there was adequate proof that the yards company acted as the railroad's agent in receiving the instructions which were as testified to by Hutcheson and not as they appeared upon the written orders

or live stock contracts, and that therefore there was a breach of the contract for which plaintiff in error became liable.

The question here is not for damages for failure to stop and feed at the specified places. The cases cited by plaintiff in error related to that question and involved no dispute as to the place of delivery. The destination in these cases was as directed. Here it was not. Delivery was to be at Lancaster only in case the shipper chose to forward from Indianapolis.

But plaintiff in error contends that there was not competent proof of the difference between the market price in Lancaster and Indianapolis. The market price at Indianapolis was shown by competent evidence to be $7.50 to $8.00 per cwt., and it was sufficiently shown, we think, the cattle brought the best available price when sold at Lancaster. Their weight at the latter point was established by proving the book entries made by the bookkeeper of the commission firm when it sold the cattle. These book entries were made from the original scale tickets made out by the weighmaster at the Lancaster union yards where the cattle were delivered and sold. These tickets or certificates of weight were issued by him to the salesman who placed on each the selling price of the cattle weighed. These tickets were destroyed after about one year and the name of the weighmaster was unknown. The copies thus made of the tickets from said original record of weights appeared to be the best evidence obtainable, and hence was competent. The selling prices were also duly shown by other evidence. The judgment included in addition to the undisputed items before referred to, the difference between the selling prices at Lancaster, as thus shown, and the market prices at Indianapolis, as above stated.

r live stock contracts, and that therefore there was a breach
f the contracts for which plaintiff in error became liable.

The question here is not for damages for failure to
ter and feed at the specified places. The cases cited by
laintiff in error related to that question and involved no
ispute as to the place of delivery. The destination in these
ases was as directed. Here it was not. Delivery was to be
t Lancaster only in case the shipper chose to forward from
ndianapolis.

But plaintiff in error contends that there was not
ufficient proof of the difference between the market prices in
ancaster and Indianapolis. The market price at Indianapolis
as shown by competent evidence to be $7.80 to $8.00 per cwt.,
nd it was sufficiently shown, we think, the cattle brought
he best available price when sold at Lancaster. Their weight
t the latter point was established by proving the book entries
ade by the weighmaster of the Lancaster Union Stock Yards
attle. These book entries were made from the original memo-
randa made out by the weighmaster at the Lancaster union
ards where the cattle were delivered and sold. These itemized
ertificates of weight were issued by him to the consignees
nd placed on each the selling price of the cattle weighed.
These tickets were destroyed after about one year and the case
f the weighmaster was unknown. The copies thus made of the
tickets from said original record of weights appeared to be the
best evidence obtainable, and hence was admitted. The selling
prices were also duly shown by other evidence. The judgment
rendered in addition to the undisputed items referred to,
the differences between the selling prices at Lancaster, as thus
shown, and the market prices at Indianapolis, as above stated.

We think, too, that it was properly inferable from the evidence that the arrangements made by Hutcheson as aforesaid, for the shipment of the cattle was with reference to the 142 head that were shipped in the five cars.

We think therefore the judgment should be affirmed.

AFFIRMED.

Gridley, P. J., and Morrill, J., concur.

227 - 26400

SAMUEL BROWN, Jr.,
Complainant,

vs.

MARTHA M. BENSON et al.,
Defendants.

VIRGINIA M. BENSON,
Intervening Petitioner,
Appellee,

vs.

J. H. CLARK HARDWARE CO.,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

224 I.A. 637

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal by J. H. Clark Hardware Co., from an order respecting the disposition of rents in the hands of a receiver appointed in the above entitled foreclosure suit with power to collect the same. The rents in question were collected from the real estate under foreclosure herein, during the period of redemption and after the death of Martha M. Benson, the principal defendant to the bill of complaint and owner of the equity of redemption, whose only heir, Virginia M. Benson, was declared by the order in question to have a superior right thereto. The decree declared appellant to have a lien on the premises only, subordinate to complainant's lien under the trust deed which was declared to be on both the premises and said rents, and which was satisfied in full without recourse to said rents.

This appeal was consolidated for hearing with other appeals from the order, and what we have said in the opinion filed on the appeal of Gustave T. Teller, in case No. 26399, in affirming the order appealed from is applicable to the present case and disposes of appellant's contentions. Accordingly the decree will be affirmed.

AFFIRMED.

Tridley, P. J., and Morrill, J., concur.

228 - 26401

SAMUEL BROWN, Jr.,
Complainant,

vs.

MARTHA M. BENSON et al.,
Defendants.

VIRGINIA M. BENSON,
Intervening Petitioner,
Appellee,

vs.

HUB ELECTRIC COMPANY,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

224 I.A. 337

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal by Hub Electric Company from an order respecting the disposition of rents in the hands of a receiver appointed in the above entitled foreclosure suit with power to collect the same. The rents in question were collected from the real estate under foreclosure herein, during the period of redemption and after the death of Martha M. Benson, the principal defendant to the bill of complaint and owner of the equity of redemption, whose only heir, Virginia M. Benson, was declared by the order in question to have a superior right thereto. The decree declared appellant to have a lien on the premises only, subordinate to complainant's lien under the trust deed which was declared to be on both the premises and said rents, and which was satisfied in full without recourse to said rents.

This appeal was consolidated for hearing with other appeals from the order, and what we have said in the opinion filed on the appeal of Gustave T. Teller, in case No. 26399, in affirming the order appealed from is applicable to the present case and disposes of appellant's contentions. Accordingly the decree will be affirmed.

AFFIRMED.

Bridley, P. J., and Morrill, J., concur.

229 - 26402

SAMUEL BROWN, Jr.,
Complainant,

vs.

MARTHA M. BENSON et al.,
Defendants.

VIRGINIA M. BENSON,
Intervening Petitioner,
Appellee,

vs.

MURPHY DOOR BED COMPANY,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

224 I.A. 637

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal by Murphy Door Bed Company from an order respecting the disposition of rents in the hands of a receiver appointed in the above entitled foreclosure suit with power to collect the same. The rents in question were collected from the real estate under foreclosure herein, during the period of redemption and after the death of Martha M. Benson, the principal defendant to the bill of complaint and owner of the equity of redemption, whose only heir, Virginia M. Benson, was declared by the order in question to have a superior right thereto. The decree declared appellant to have a lien on the premises only, subordinate to complainant's lien under the trust deed which was declared to be on both the premises and said rents, and which was satisfied in full without recourse to said rents.

This appeal was consolidated for hearing with other appeals from the order, and what we have said in the opinion filed on the appeal of Gustave T. Teller, in case No. 26399, in affirming the order appealed from is applicable to the present case and disposes of appellant's contentions. Accordingly the decree will be affirmed.

AFFIRMED.

Bridley, P. J., and Morrill, J., concur.

[illegible]

[illegible]

[illegible]

21850

246 - 26419

ERLING ASKER,
Appellee,

vs.

ISAAC GORDON,
Appellant.

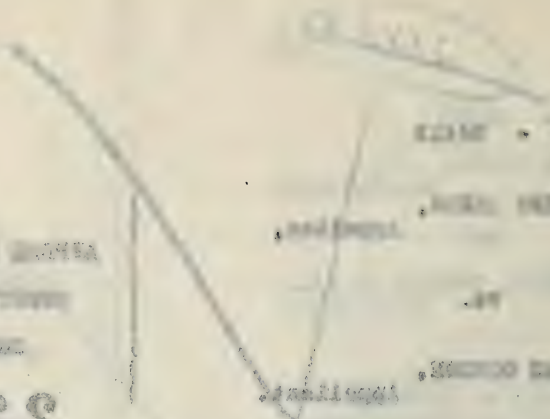
APPEAL FROM
COUNTY COURT,
COOK COUNTY.

224 I.A. 637

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Appellee Asker (plaintiff below) made a written contract August 14, 1915, to purchase from appellant Gordon (defendant below) a house and lot at Chicago Heights, covenanting to pay $3200 therefor, $200 cash and $30 each month the first year and $25 each month thereafter until paid for, with interest, also all taxes and assessments after 1914. Under the contract appellant had an option to forfeit all payments as liquidated damages on appellee's failure to perform all covenants. Appellee took possession of the premises and lived there until December 18, 1917. About three days before that time he made known to Gordon his desire to move to Chicago and give up the premises, and a verbal arrangement therefor was made on the 18th, when appellee surrendered possession of the premises and his contract of purchase. He had paid the $200 cash and $30 a month for 28 months, in all $1040.

The parties differed as to the terms of the arrangement. Plaintiff claimed that defendant was a mere agent to dispose of plaintiff's interest in the premises and paid him back $100, and agreed to pay him $240 more, the remaining $700 of the $1040 to be treated as rent for his use of the premises, and to pay him any excess over $3200 the property might bring on a sale; that defendant sold the premises for about $650 more than that sum, and withholds it and the $240, and interest thereon.



There were no other witnesses to the arrangement except the parties thereto, the testimony of each conforming to his respective claim. Both agreed that the written contract and possession of the premises were to be surrendered; that plaintiff received $100 in cash from defendant and was to receive $240 more; that the remaining $700 paid by plaintiff on the property was treated as rent therefor during the period of plaintiff's occupancy. They differed as to the arrangement for the $240 and as to the conditions of resale, plaintiff claiming he was to have the excess over $3200 on a resale, and defendant, that they were to divide equally the net profits over $3200 after deducting expenses incident to the resale. Defendant sold the property together with 13 or 15 feet of an adjoining lot belonging to defendant for $4000. The verdict was for $626.52. From the judgment entered thereon this appeal was taken.

It is unnecessary to discuss the probability or improbability of either party's contention as to what were the terms of the verbal contract, for it was unquestionably error for the court to refuse the admission of certain testimony offered by defendant in support of his plea supported by an affidavit setting up the particulars of his defense. The plea was the general issue and the proof offered was in conformity with such affidavit.

The court refused to receive his testimony on the value at which the 13 or 15 feet of the adjoining lot was figured on the resale, what expense he was put to in the resale, and what statement thereof he had given to plaintiff. Defendant testified that the verbal arrangement was that plaintiff was to receive credit for the $240 in case he bought another lot of defendant. The court struck out this testimony on the theory that there being no written contract for the purchase of another lot, an agreement to credit $240 thereon was within the statute

There was no other witnesses in the arrangement except his partner Omerto, the testimony of each contradicting the respective claim. This agreed that the written contract and guarantees of the products were to be manufactured; that plaintiff received $100 in cash from defendant and was to receive $200 more; that the remaining $700 paid by plaintiff on the property was invested as rent income during the period of plaintiff's occupancy. They differed as to the arrangements for the $800 and as to the conditions of resale, plaintiff claiming he was to have the excess over $3000 credited, and defendant that they were to divide equally the net profits over $3000 after deducting expenses incident to the resale. Plaintiff sold the property together with 13 or 15 feet of an adjoining lot belonging to defendants for $4000. The verdict was for $800.00. From the judgment entered thereon this appeal was taken.

It is unnecessary to discuss the probability or improbability of either party's contention as to what was the terms of the verbal contract, for it was unnecessarily error for the court to permit the admission of certain testimony offered by defendant in support of his plea unsupported by an affirmative setting up the partnership of his nature. The plea was the general issue and the proof offered was in contravention with such affirmative.

The court refused to receive his testimony as the matter of which the 13 or 15 feet of the adjoining lot was figured in the trade, what expense he was put to in the resale, and what allowance thereof he had given to plaintiff. Defendant testified that the verbal arrangement was that plaintiff was to receive credit for the lot in case he bought another lot at defendant. The court admitted his testimony as the theory that there being no written contract for the purchase of another

of frauds. This was a misapprehension of the issue. Both parties claimed that the arrangement was an oral one with respect to disposing of plaintiff's interest in his contract, and whatever was said by either as to the terms thereof, whether it related to the actual or possible purchase of another lot, was admissible evidence. Defendant was not trying to enforce an oral contract to purchase another lot. His position was that plaintiff was to receive credit for $240 only in case he purchased another lot, and he had the right to show that the credit was conditional, and that the condition had not been complied with.

Defendant's attorney asked defendant what were the net profits. The court sustained objection to the question, saying: "There is nothing in the record thus far to warrant any assumption that this man (referring to defendant) was authorized to incur any expense. The testimony thus far is that this man was to be the agent of that man." We think this remark of the court was prejudicial. If the arrangement was for net profits, as claimed by defendant, he had a right to show what they were, and we think the right to deduct expenses incidental to the sale might be implied without any affirmative proof to that effect. Nor was the court's remark as to evidence of agency warranted. Whether defendant was plaintiff's agent was one of the issues of the case. The testimony of defendant tended to show that he was not; that he purchased plaintiff's interest in the contract thereby vesting the equitable as well as the legal title in himself, and that they were to share the net profits only in case of a resale over a certain sum, but that defendant was under no obligation to sell his own property. Defendant's version of the verbal arrangement was inconsistent with plaintiff's contention of agency. From the court's remark the jury might well have inferred plaintiff had established his case.

Because of the errors stated the judgment will be reversed and the cause remended.

REVERSED AND REMANDED.

Bridley, P. J., and Morrill, J., concur.

218 62

283 - 26457

LOUIS LEWISON,
Appellee,

vs.

ISRAEL WEXLER and HARRY WEXLER,
doing business as THE AMERICAN
BAG SUPPLY COMPANY,
Appellants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

224 I.A. 637

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Appellee sued appellants for a balance alleged to be due him for burlap bags sold and delivered to defendant. The latter claimed a balance in their favor for moneys advanced to him in excess of the purchase prices for the bags. The case was tried without a jury.

The deliveries were made at defendants' premises where an employe of defendants counted the bags, and put their number and prices on a bill which he handed to plaintiff and of which carbon copies were kept in defendants' books. The transactions ran over a period of nearly 16 months when defendants claimed plaintiff owed them about $96. Plaintiff's son then asked, and was given, permission to examine defendants' books. This was done with the aid of defendants' bookkeeper. He claimed they showed a balance in plaintiff's favor. These books, and the original bills with which they correspond, were introduced in evidence and covered all the transactions excepting one with respect to which the bill was missing.

Defendants claimed that they had entered into an agreement with plaintiff to allow plaintiff $85 on the missing bill, estimating it according to the largest delivery. Plaintiff denied that there was any such agreement and claimed the amount of the bill was about $300. The books showed larger bills than for $85, and the court allowed for such missing

Appellee sued appellants for a balance alleged to be due him for hauling hogs said defendants to delivered. The latter claimed a balance in their favor for hogs delivered to him in excess of the purchase price for the hogs. The case was tried without a jury.

The Bellefontaine were made of defendants' premises where an employe of defendants counted the hogs, and put their number and price on a bill which he handed to plaintiff and of which certain copies were kept in defendants' books. The transactions ran over a period of nearly 12 months then defendants claimed plaintiff owed them about $98. Plaintiff's son testified, and was given permission to examine defendants' books. This was done with the aid of defendants' bookkeeper. In claiming they showed a balance in plaintiff's favor. These books, and the original bills with which they corresponed, were introduced in evidence and covered all the transactions concerning the sale requests in which the bill was adjusted.

Defendants claimed that they had paid plaintiff in full in dealings between plaintiff in which plaintiff had on the already bill, excluding it accounting to the hogged delivery. Plaintiff denied that that there was any such agreement and claimed the amount of the bill was about $200. The trial court allowed larger credit than for $98, but the court allowed for such statutes

bill the sum of $100, which was less than the amount of some of the deliveries, and found the balance due on the other bills was $346.98.

Plaintiff was an illiterate man and had no record of the transactions except such original bills. He claimed the amount of merchandise delivered, exclusive of that covered by the missing bill, was $3,876.98, and the amount of cash received by him $3,530, leaving a balance in his favor of $346.98 in addition to what was due on the missing bill.

From an examination of the abstract it is apparent that the court's findings as to the balance of $346.98 was reached from a computation of debits and credits as they appear from the documents aforesaid. They have not been abstracted. The exhibits are 65 in number, the books 4, and contain several hundred items. Whether the court's computation is correct can only be ascertained by our going through the several items and determining from the meager evidence what are debits and what are credits. To do this we would have to go to the record, as they are not abstracted. We have frequently held that we will not examine into the record in order to reverse a judgment. The abstract should have contained the several items, and if the court's computation was incorrect counsel should have pointed out in what respect. We are not required, without an abstract of the bills or books from which the computation was made, or the aid of argument directing us to evidence that would disclose mistakes of the court, to go to the record for the purpose of casting up a stated account between the parties. Accordingly the judgment will be affirmed.

AFFIRMED.

Gridley, P. J., and Morrill, J., concur.

2187a

323 - 26497

INTERNATIONAL GRAND LODGE BROTHERHOOD OF RAILROAD PATROLMEN,
Appellee,

vs.

CHARLES E. COPELAND et al.,
Appellants.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

224 I.A. 638

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order for commitment for contempt. The only question raised is whether the action of defendants was contumacious.

Charles E. Copeland and Della Copeland, their agents, solicitors and employes were by injunctional order entered May 20, 1920, restrained from withholding possession of the seal, books, papers and personal property of the Grand Lodge of the Brotherhood of Railroad Patrolmen from its Grand lodge secretary, W. L. Kahl, and from in any manner interfering with the discharge of duties by officers of the Grand Lodge executive board. On a hearing had on a petition setting forth violations of said order, and answer of respondents, and the evidence heard, the court found that Charles E. Copeland and Joseph Norton, one of his employes, had wilfully failed and refused to obey the order of the court so entered. After the hearing the court gave them two days within which to purge themselves of contempt by complying with the order, which they failed to do.

We have read the pleadings and testimony and think the record fully justifies the court's findings and order.

The main facts on which the order rests do not seem to be disputed. After the entry of the injunctional order it is

undisputed that Copeland sent out letters to certain agents of the Brotherhood which in effect challenged the jurisdiction of the court, and displayed a defiant attitude toward it. Regardless of whether the transmission of them constituted contempt of the court's order they at least served to negative Copeland's contention that in his subsequent failure to comply with the demand of W. L. Kahl, grand secretary as aforesaid, for the possession of the property of the Grand Lodge, there was no intention to violate the injunctional order. As an excuse for his failure to comply with the demand, Copeland stated in his affidavit that he understood that he was acting within his rights in so setting up certain matters of fact which took place prior to the entry of the jurisdictional order relative to a controversy over offices in the Lodge and expulsion of said Kahl as a member of a local union thereof, and claiming that in all his actions pertaining thereto he was complying with the constitution and by-laws of the order, from which he was not restrained by the order of court. None of these matters was material to the charge of withholding from the grand secretary possession of the property of the Grand Lodge after a demand therefor was made on him.

A point is made with respect to the character of the notice of the order served upon Copeland at the time of the demand. No service thereof was necessary to compel his obedience thereto as he was in court when it was entered. (O'Callaghan v. O'Callaghan, 69 Ill. 552.) The material matter before the court was whether Copeland wilfully failed or refused to deliver possession of such property on a demand therefor.

Said Kahl, accompanied by one McNamara, went to the headquarters of the Brotherhood three days after the injunctional order was entered and both testified that Kahl then presented

Copeland with the order of the court and asked possession of the office and keys and other property. It is admitted by Copeland that at that time and place they presented him with a copy of the injunction order. He denied any express refusal to deliver up the same but claimed that while he had gone to the telephone to consult his attorney with regard to the meaning of the injunctional order Kahl and his companions left, and this claim was supported by other affidavits. On the other hand, it appears from the petition, and the oral testimony of both Kahl and McNamara, that Copeland read the order and said that he wouldn't do anything until he saw his attorney. As there was nothing ambiguous or that required explanation in the order which in the plainest terms restrained him from withholding such property from said Kahl, the pretext for delay to consult his attorney was under all the circumstances equivalent to a refusal to deliver the property.

McNamara testified that he also said that he did not "care for a court rule." While he denied so saying it was also alleged in the petition, sworn to by Kahl, that in addressing a meeting of the local after the application for the injunction had been filed, Copeland said "that no court on earth could stop me. * * * No court on earth has any jurisdiction over me or the Brotherhood of Railroad Patrolmen that I have built up." We cannot but be impressed from his own affidavit that he still maintained that attitude. While he disclaims any intention therein to violate the court order and denies any express refusal to deliver up possession of the property yet he admits being served with a copy of the order and telephoning to his attorney with respect to its meaning. It is manifest that he understood the nature and purpose of the demand and that he intended to defeat it, for he asserts in his petition that he felt that said Kahl was "using the court's

order as a cloak to screen his unlawful, illegal and improper conduct with reference to the affairs of the Brotherhood," and further alleges that said Kahl was not entitled to come on the premises of the order, notwithstanding the injunctional order expressly prohibited him from withholding from said Kahl possession of the property of the Grand Lodge which was at said headquarters. His affidavit further indicates a defiant attitude in his characterization of the injunction proceedings, which had been decided against him, "as a step in breaking up of the order," and "not filed for any good purpose," and by still asserting, contrary to the injunctional order, that Kahl had no rights in the Brotherhood Order and that he himself was complying in every respect with its constitution and by-laws, thus in effect taking the position that if in his judgment the injunction conflicted with such constitution and by-laws, he would obey the latter rather than the injunction.

Appellant Joseph Norton, who was present with Copeland and one of his agents at the headquarters at the time of the demand, admits that he refused said Kahl admission to said headquarters when he came there the following day for the express purpose of taking possession of said property, and that he was one of the trustees of the building at the headquarters. Kahl testified that Norton asked him what he wanted, and he said: "I want to get into the desk," and Norton replied: "You get out of here and stay out and don't come back." This interference with Kahl as such officer of the Grand Lodge was clearly a violation of the injunction. He also disclaimed an intention to violate it. Notwithstanding testimony sufficient to sustain the order of commitment, respondents were given an opportunity to purge themselves of contempt. The fact that they did not see

fit to avail themselves of it strongly negatives their claim of no intention to violate the court's order.

We think the court was fully justified in its finding and order, and that the penalties imposed were none too severe for what was unquestionably a contumacious contempt of the court's order.

AFFIRMED.

Bridley, P. J., and Morrill, J., concur.

21882

345 - 26519

ELLEN SNEDECKER,
Appellee,

vs.

DIRECTOR GENERAL OF RAILROADS, operating Chicago, Burlington & Quincy Railroad Company, a corporation,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

224 I.A. 638

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an action to recover $1,500 claimed to be due appellee as beneficiary of her deceased son, William E., alias John W. Stack, from the relief department of the Chicago, Burlington & Quincy Railroad Company, a department organized to provide certain benefits for such of its employes as became members thereof. At the time of Stack's death the law required the action to be brought against the Director General of Railroads.

The application for membership in said department provided that any untrue or fraudulent statement to the medical examiner, or any concealment of facts in the application, or "any attempt to defraud or impose on the relief fund," would work a forfeiture of membership. Appellant pleaded that the membership was obtained by fraud, and it is conceded that this was the only issue to be determined in the action, and that the facts being undisputed the court should have directed a verdict one way or the other, but defendant claimed that the verdict should have been directed for defendant instead of for plaintiff.

Stack was in the employ of said railroad company for a short time in the years 1910 and 1913 under the name of

defendant claimed

William H. Stack, and from January, 1917, to his death in November, 1918, excepting for a brief period of his service in the army, under the name of John W. Stack, a name he had assumed and gone under from January, 1916, after his application then made was for some undisclosed reason rejected.

He obtained employment with the company in January, 1917, and again applied for membership in said relief department and was accepted. Being discharged from the army in about a month he again, on June 21, 1918, resumed employment with the company, and on that same date again applied for and secured membership in said department. While the company held his position open for him yet as he was not actually in its employ receiving wages and contributing to the fund in the interim of service in the army, his membership therein ceased and it became necessary that he again make a formal application to become a member. Plaintiff's rights rest upon the latter membership.

The fraud relied on is that in prior applications Stack made false statements with regard to his previous employment with the company and with respect to applying for membership in said department, and that he in no way referred thereto in his subsequent applications, and that he assumed the name of John W. Stack, so that the company might not recognize his identity and reject his application.

These charges would be important if plaintiff's rights rested on the membership secured in January, 1917, but they rest upon a different membership, that approved June 21, 1918, and it is only the statements then made that are relevant to the issues. It is with reference to the following questions and answers thereto that the charges must be tested.

William H. Shaw, and from January, 1921, to his death in December, 1922, everything for a brief period of his service in the army, under the name of John C. Shaw, a name he had assumed not from Walter from January, 1918, after his application then made was for some unexplained reason rejected.

He attempted enlistment with the marines in January, 1917, and again applied for membership in said field artillery-men and was accepted. Being distinguished from the army in about a month by regis, on June 21, 1918, promoted, implemented with the company, and we find some time again applied for and received membership in said department. While the company said the physician upon for John got on be was not actually in the regular military years and contributing to the fund in the interest of service in the army, his immediately thereafter means and it seems necessary that he again make a formal qualification to become a member. Plaintiff's rights rest upon the latter membership.

The fund rested on in what is after qualification fifty year fifty statements with regard to his previous employed with the company and with respect to qualifying for membership in such department, but that he is on any referred thereto in his subsequent qualification, and that he thereof the same as John C. Shaw, so that the company might not re-engage his identity and repeat his qualification.

These charges would be important if plaintiff's rights rested on the membership received in January, 1917, but they have been a different transaction. Just assumed that in 1918, and it is only the statutory time which can be relevant to the issues. So he with reference to the plaintiff qualified and memorandum stated that the charges must be sustained.

"1. What is your name? John W. Stack.

2. When were you born? August 7, 1887.

3. Have you ever been a member, or examined for membership, in any relief fund or any railroad in the Burlington system? Yes.

4. Where and when? Chicago, Illinois, 1915, Mr. P. J. Reilly, G. Y. M.

5. How long have you been in the service of the company continuously? Entering service 6/21/13."

As to his name, he had a legal right to change it. (Smith v. U. S. Casualty Co., 197 N. Y. 420; Loser v. Savings Bank, 128 N. W. Rep. 1101.) The assumption of that right did not operate as a fraud, especially as he had exercised it openly for more than two years and a half prior to his last application and had been known by that name to the company for the previous period of employment of about seventeen months.

As to the date of his birth, even his mother was unable to tell whether it was in the year 1886, as given in the previous application, or 1887. The answers to the other questions were all correct. The only contention that can possibly be made is that the applicant might have made fuller answers to some of them. But we do not deem his failure so to do constituted a fraud or concealment of such facts as would forfeit his membership. One sitting down to write answers to such questions might reasonably and honestly interpret them as calling for no fuller replies than were made, and as not necessarily calling for reference to applications or facts previous to his last employment, with which the company was familiar. If the company with its knowledge of the facts since January, 1917, deemed such answers incorrect or fraudulent then it should have rejected instead of accepted the application. But as we understand it the charge is not predicated upon the answers made to the last application except possibly as to the

alleged misstatement of name and age, but upon previous misstatements which, in our opinion, have no relevancy to the issues.

The court in directing the verdict presumably disregarded the evidence of prior applications as irrelevant to the issues, and also the testimony of the superintendent of the relief fund to the effect that he would not have approved of Stack's application had he known of his previous applications, which was incompetent. (Mutual Aid. Ass'n. v. Hall, 118 Ill. 169, 172.) Before directing the verdict the court should have stricken out such evidence, all of which it had received over objection. But we do not think we should reverse when upon the elimination of such evidence the verdict would stand. The material facts being undisputed another trial would necessarily bring about the same result.

In this view of the case it becomes unnecessary to consider whether the statements constituted warranties, they in effect not being untruthful or fraudulent.

Accordingly the judgment will be affirmed.

AFFIRMED.

Gridley, P. J., and Morrill, J., concur.

alleged misrepresentations of some such sort, but upon previous pleadings which, in our opinion, have no relevancy to the issues.

The court in directing the verdict peremptorily disregarded the evidence of police negotiations in investigations by the lessee, and also the testimony of the superintendent of the police force to the effect that he would not have approved of Shank's application had he known of his previous conviction, which was immaterial. [Cleveland Ind. Order v. Shank, 111 Ind. 328, 377.] Before directing the verdict the court should have satisfied not such evidence, all of which is the contrary and exclusive. That we do not think we should hesitate upon the sufficiency of such evidence the material small issue. The material facts being undisputed another trial would be merely trying about the same result.

In this view of the case it becomes unnecessary to consider whether the statutes, constitutional provisions, may be affect our being considered as [illegible].

Inasmuch as judgment will be affirmed.

AFFIRMED.

Dailey, J., J., and Davis, J., concur.

~~21892~~

376 - 26570

G. L. WOOD,
Appellee,

vs.

C. G. LUNDQUIST et al.,
Appellants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

224 I.A. 638

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendants setting up as his cause of action that they agreed to buy, and he to sell, his stock in the Wood-Oakes Company, a corporation, for a price to be thereafter fixed. The contract was signed December 27, and the price fixed at $5,420.79, December 31, 1919. The statement of claim alleges that he demanded payment and tendered performance, and that payment was refused.

Defendants admitted such an agreement was made but claimed that it was afterward rescinded, that a new contract was afterwards entered into with different terms and conditions, and that while plaintiff made a demand it was not made in accordance with the terms of the agreement of December 27, or the subsequent agreement, and that defendant had offered to perform the new agreement.

The verdict for plaintiff was for the price as aforesaid.

With respect to the questions of tender and the assessment of damages the case is controlled by what was said in Erickson v. Sherwood, 171 Ill. App. 426. In that case plaintiff sought, as here, by an action of assumpsit to recover damages for a breach of a contract whereby a defendant agreed to repurchase stock from plaintiff at the same price he had paid plaintiff therefor. Plaintiff claimed to have

[illegible]

[illegible]

[illegible]

made a tender thereof and offered no evidence of its value. In the opinion the court referred to facts analogous to those at bar, namely, that the tender was not kept good, that the title of the stock still remained in plaintiff, and that plaintiff had both the stock and a judgment for the amount paid therefor; and the court held that plaintiff could recover only on the theory of a breach of contract, and that the measure of damages would be the difference between the contract price and the market price of the stock at the time and place for the re-delivery of the same.

The trial of the case below proceeded much as if the action were one for specific performance instead of one at law requiring proof of damages according to the rule stated in the cited case. Plaintiff was not entitled to a judgment for the agreed price of the stock, regardless of its value, either under the pleadings or proof. And under one of the instructions complained of the jury were misdirected as to the measure of damages, it authorizing a recovery of the purchase price without any proof of the value of the stock. The giving of the instruction constituted reversible error.

In this view of the case we deem it unnecessary to consider other points urged for reversal. A grave question is raised as to the sufficiency of the tender. It is unimportant, however, if it was waived, as evidence tended to show.

REVERSED AND REMANDED.

Gridley, P. J., and Morrill, J., concur.

418 - 26592

HEIDLER HARDWOOD LUMBER COMPANY, a corporation,
Appellee,

vs.

B. A. WITHEY COMPANY, a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

224 I.A. 638

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Appellee sued to recover the purchase price of lumber sold and delivered to appellant. Appellant set up in its affidavit of merits that the lumber was not in accordance with the order therefor, it not being thoroughly kiln dried, as ordered, and that it sustained a loss in consequence thereof of $931.65, for which it filed a counter statement of claim.

The order was given over a telephone to Mr. Heidler, plaintiff's president, by Mr. Withey, defendant's president. The latter testified that he told Heidler the nature of his business, that he had to have thoroughly dried lumber, and that Heidler replied he had "some fairly good dried kiln lumber; thoroughly dried kiln lumber," and that was practically the whole conversation. The lumber was delivered within one or two days and defendant immediately sawed it up in shape and put it through various machines for joining, gluing, drilling, etc. When he had sawed up about half the lumber he discovered that some of it had shrunk.

The only fact in controversy is whether the lumber was kiln dried. Against the testimony of defendant's president and bookkeeper that some of the lumber shrunk, plaintiff's testimony, including that of two witnesses who had inspected the lumber and claimed expert knowledge on the subject, was

that the lumber was kiln dried, as that term is known in commercial dealings. The process was described which required that the lumber be "put through a certain amount of humidity, temperature, etc., to get it down to a certain percentage" which can be definitely ascertained by instruments, and to "between five and six per cent" by eye inspection. From an examination of such testimony we are not prepared to say that the verdict was against the preponderance of evidence, or that it did not show that the lumber was what is known to the trade as dried kiln lumber.

Heidler testified that when he took the order he told Withey that if the lumber was not satisfactory he might return it. And it appears that defendant continued to cut up and use the lumber after it discovered that some of it had shrunk. Defendant had an opportunity to inspect the lumber when it was delivered, and it would seem that by inspection or the use of instruments it could have discovered whether it was dried kiln, or sufficiently dried kiln to answer its purpose. It was said in American Theatre Co. v. Siegel Co., 221 Ill. 145:

> "The law does not permit a person to receive goods under a contract, appropriate them to his own use, and then defeat an action for the purchase price on the ground that the goods were not of the exact quality or description called for by the contract. His remedy, in the absence of a warranty, is to refuse to accept the goods when delivered, or to return them within reasonable time after the departure from the terms of the contract is discovered."

But defendant claims there was an implied warranty of the fitness of the lumber for the specific purpose for which defendant bought it. The testimony is altogether too meager to support the inference that plaintiff knew the specific uses for which the lumber was bought. On the contrary, Heidler seems to have left it to defendant to determine whether it was

satisfactory. The authorities are to the effect that in such a case the buyer must be held to have purchased upon his own inspection, or if he failed to do so, at his own risk. (Telluride Power Transmission Co. v. Crane, 208 Ill. 218; Peoria Grape Sugar Co. v. Turney, 175 Ill. 631; Chicago House Wrecking Co. v. Durand, 105 Ill. App. 175.) We find no modification of this principle in the uniform sales act that is applicable to the state of facts here presented.

Accordingly the judgment will be affirmed.

AFFIRMED.

Gridley, P. J., and Morrill, J., concur.

21912

106 - 26272

MARY W. BROWNLEE,
Appellee,

vs.

ROBERT S. ADAMS,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

224 I.A. 639

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

This is a suit for the recovery of $175, being the amount of an alleged over-payment made by plaintiff to defendant. The case was heard without a jury. There was a judgment and finding in favor of plaintiff for $175 and costs, a reversal of which is now sought.

Defendant was employed by Thomas R. Brownlee, the deceased husband of plaintiff, to do painting and decorating work upon the building at 1419 Pratt avenue in Chicago. The contract price was $605. The work was done in March, 1917. Mr. Brownlee owned the building and resided there with his family. He died intestate in March, 1918, leaving him surviving his widow, the plaintiff, and five children. Plaintiff took no part in the transaction between her husband and defendant and had no knowledge as to the state of the account between them.

Some months after Mr. Brownlee's death defendant presented to plaintiff an itemized statement of his account against her husband amounting to $605 with a credit for a part payment of $150, leaving a balance due of $455. There was some conversation between them. Defendant asked for payment. Plaintiff declined to pay and mentioned that some of the work was done in an unsatisfactory manner and that some of the charges were unwarranted. Defendant asked, "Could you pay me $400?" Plaintiff replied "No." Defendant then said,

"Well, I will leave it to you. Do the best you can." Thereafter on August 1, 1918, plaintiff sent to defendant her check for $300, which was intended to be in full payment of the account, and so stated on its face. This check was paid in due course of business and defendant received the proceeds. Thereafter plaintiff found among her husband's effects two checks drawn by her husband in favor of defendant, one for $100 and the other for $75 evidencing further part payments on the contract in question. These checks bore the endorsement of defendant and had been paid and cancelled in due course of business. Defendant admitted that he had received the proceeds thereof, but explained that his bookkeeper through some error or inadvertence had failed to credit Mr. Brownlee with the amount thereof. At the time of presenting the account to Mrs. Brownlee he was honestly mistaken in believing that there was a balance of $455 due him, although as a matter of fact the balance was $280 only. Consequently, upon receipt of Mrs. Brownlee's check for $300 his entire account was overpaid to the extent of $20, which amount he immediately tendered to plaintiff, who declined to accept the same. This suit is brought by plaintiff to recover $175 which she claims to have paid defendant under a mistake of fact. That there was such a mistake is not denied by defendant.

Plaintiff was under no legal obligation to make any payment whatever to defendant, although it was doubtless to her interest that defendant's account should be settled. She made the payment in ignorance of the exact state of the account and under a misapprehension in respect thereto. It has been held in many cases that a payment made under such circumstances may be recovered. Stempel v. Thomas, 89 Ill., 146; Mulas Hardware Co. v. American Express Co., 65 Ill. App., 596. The general

rule that payments made in mistake of fact may be recovered is applicable when it is sought to recover an over-payment, since such ignorance is regarded as a mistake of fact. A recovery is not precluded merely because the person making such over-payment had means of ascertaining the state of the account. Simms v. Vick, 151 N. Car., 78; 24 L. R. A., 517. An action of this kind is an appropriate remedy to enforce the obligation that arises in a case where one person has received money under such circumstances that in equity and good conscience he ought not to retain. Highway Commissioners v. Bloomington, 253 Ill., 174, and cases cited. We think that substantial justice was done by the judgment of the Municipal Court.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

2/922

129 - 26296

EMIL KRAUT,
Appellee,

vs.

JOSEPH KASZAB,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

224 I.A. 639

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

Suit was brought by appellee as plaintiff in the Municipal Court of Chicago January 14, 1920, to recover the value of certain goods and chattels alleged to have been owned by plaintiff and wrongfully converted by defendant sometime in the year 1916, the day and month not being specified. The value of the goods and chattels, which consist of tools and machinery, is stated to be $1,000. The affidavit of merits denied the alleged conversion and set up the statute of limitations as a defense. The case was tried before the court without a jury and resulted in a finding and judgment for $1,000, from which defendant prayed and was allowed an appeal.

It is urged on behalf of appellee that the judgment should be affirmed because counsel for plaintiff neglected to argue a motion for a new trial. We find no merit in this contention. It is not necessary to make a motion for a new trial where a jury is waived by agreement and trial is had before the court. Baxter v. City, 194 Ill. App., 62; Crandall v. Kirk, 185 id., 460; Wildman v. Great Western S. & R. Co., 166 id., 534.

The evidence shows that the merchandise in question was purchased by defendant in November, 1912, at an auction sale. Both plaintiff and defendant were present at the sale and interested in the purchase. Plaintiff claims that he bought the property and paid for it by two checks dated November 9, 1912,

for the sum of $300 and $816.50 respectively, which were payable to and cashed by the auctioneer. Defendant testified that he was the purchaser of the property at the auction sale and that he had used plaintiff's checks in payment therefor at plaintiff's suggestion in order that the checks might constitute a voucher showing the money paid to the auctioneer. Defendant testified that at the time in question he gave plaintiff in cash the amount of the two checks. The auctioneer gave to defendant an invoice of the property indicating on its face that the goods had been purchased by defendant. Thereafter the goods and chattels were delivered by defendant to the United States Barber Furniture Manufacturing Company, a corporation. Plaintiff was the secretary and treasurer and defendant was the president of the corporation. They constituted two of the three members of the board of directors. The property was sold by defendant to this corporation on January 25, 1913, on which date the corporation executed a chattel mortgage, which was signed and acknowledged by defendant as president and plaintiff as secretary. Nothing was ever paid on the chattel mortgage. Defendant took possession of the property in the latter part of 1914 under the chattel mortgage and plaintiff had full knowledge thereof and made no objection or claim to ownership. There was a mortgagee's sale on December 12, 1914, the proceeds of which amounted to $350. A short time prior thereto the United States Barber Furniture Manufacturing Company became involved in bankruptcy proceedings and a receiver was appointed by the United States District Court. A portion of the property covered by the mortgage had passed to the possession of the receiver, who restored it to defendant pursuant to an order of the Federal Court. This evidence is practically undisputed, although plaintiff denied that he executed the chattel mortgage in question and that defendant paid him the amount of the checks.

The chattel mortgage was acknowledged by plaintiff

as an officer of the United States Barber Furniture Manufacturing Company in conformity with the statute. This acknowledgment cannot be impeached by the uncorroborated testimony of plaintiff. Kasturska v. Bartkiewicz, 241 Ill., 604; Spencer v. Razor, 251 Ill., 278; Bowes v. Steinlauf, 174 Ill. App., 581. The mortgage in question was given for a part of the purchase price of the goods and chattels, of which defendant was the vendor. It was a recognition of the defendant as owner. We think the judgment was against the manifest weight of the evidence and should be reversed on that account. There was no conversion of the goods as charged in plaintiff's statement of claim; therefore the defense of the statute of limitations requires no consideration.

The judgment of the Municipal Court is reversed with a finding of fact.

REVERSED WITH FINDING OF FACT.

Gridley, P. J., and Barnes, J., concur.

129 - 26296

FINDING OF FACT.

We find as an ultimate fact in this case that there was no conversion by defendant of the property described in the statement of claim.

134 - 26301

JOE DI CIANNI, a minor, by Antonio Di Cianni, his next friend,
Appellee,

vs.

SIEGEL-HICKINGER PACKING & PROVISION COMPANY, a corporation,
Appellant.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

224 I.A. 639

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Superior Court of Cook County in an action to recover damages for personal injuries. Plaintiff, who is appellee here, at the time of the accident in question was a minor about eighteen years of age. It was a jury trial resulting in a verdict and judgment in favor of plaintiff for $7500 and costs.

The declaration contains a single count, alleging that on April 25, 1918, defendant was the owner of a motor truck which it was operating at or near the intersection of South Loomis and West Taylor streets in the City of Chicago; that plaintiff on that day was riding on his motorcycle at or near said street intersection and was in the exercise of due care and diligence for his own safety; that defendant's motor truck was so carelessly, negligently and improperly driven and managed by defendant's servants that it ran into and struck plaintiff, thereby causing the injuries of which complaint is made. Pleas of the general issue and of non-ownership and that defendant was not using or operating the truck were filed.

The evidence in the case was very conflicting, rendering it difficult to determine the exact facts and the conditions existing at the time of the accident. A large

portion of the briefs of both parties is devoted to a discussion of the testimony of the various witnesses, their credibility, and questions relating to the preponderance of evidence. In the view we take as to the proceedings at the trial, it will not be necessary for us to consider these contentions in detail.

The record shows that when the attorney for plaintiff was examining the prospective jurors as to their qualifications, upon finding that one of them was a chauffeur employed by Armour & Company in driving a motor truck, he remarked to him by way of interrogation, in the presence and hearing of the other prospective jurors, "I suppose that your cars are insured, as most cars are?" Objection was made to this question by counsel for defendant. Their subsequent motion, made in apt time to discharge the entire panel, was denied by the court. Appellant urges that it was prejudiced by this question, which had the effect of suggesting to the jurors the probability that defendant was insured against accidents in the operation of its trucks and that any verdict which might be rendered would be at the expense of the insurance company. No reason appears for asking this question, and in view of the generous amount of the verdict, it seems probable that the jury was influenced by the suggestion thus conveyed to them. It has been held repeatedly that it is reversible error for plaintiff's attorney in a case of this character to intimate or suggest, directly or indirectly, to the jury at any time during the trial that the defendant is protected by liability insurance. Mithen v. Jeffery, 259 Ill., 372; E. & S. Milling Co. v. Schaefer, 101 Ill. App. 500. In a recent case this rule was applied where there had been a mere allusion to defendant's counsel as the attorney for a casualty insurance company. McCarthy v. Spring Valley Coal Co., 252 Ill., 473. It is obvious that the purpose of plaintiff's attorney in making the inquiry mentioned

was to suggest to the jury that defendant was protected by liability insurance. We do not think that the question was asked inadvertently.

It is also urged on behalf of appellant that in his final argument to the jury plaintiff's attorney indulged in remarks, statements and suggestions which were intended to and did influence the passions and prejudices of the jury and directed their attention to considerations having no legal bearing on the questions submitted to them for decision. Proper objections to this conduct were made and overruled by the court and exceptions taken. This occurred frequently. In the course of his argument counsel for plaintiff repeatedly contrasted the poverty of plaintiff with the wealth of defendant, and without warrant in the record charged defendant's agents and attorneys with conduct amounting to subornation of perjury, and otherwise directed the attention of the jury to matters which could not properly be considered by them. It is the settled rule in this state that misconduct on the part of counsel of the character mentioned is sufficient cause for reversing a judgment unless it is apparent that it did not result in injury to the defeated party. Appel v. Chicago City Ry. Co., 259 Ill., 561; Bale v. Chicago Junction Ry. Co., 259 Ill., 476; I. C. R. R. Co. v. Seitz, 111 Ill. App., 242; Paulson v. McAvoy Brewing Co., 230 Ill. App., 273. Many cases have been cited by both parties in which the courts have reversed or decline to reverse on account of the misconduct of counsel in argument. It is unnecessary for us to review these cases in detail. It is a matter resting in the sound discretion of the trial court to determine whether or not a new trial should be granted in such cases (West Chicago Street R. R. Co. v. Annis, 165 Ill., 475), but as was said in the Appel case, supra, in a clear case this court will reverse a judgment because of improper conduct of counsel "even though the trial court has sustained

not be relevant in the jury when determining was prejudiced by liability assessment. We do not think that the qualifying [illegible] raised successfully.

It is also argued on behalf of appellant that in its final argument to the jury plaintiff's attorney improperly [illegible] remarks, statements and suggestions which were intended to and influence the passions and prejudices of the jury and divert their attention to considerations having no legal bearing on the questions submitted to them for decision. Proper objections to this argument were made and overruled by the court and exceptions taken. This argument [illegible]. In the course of his argument counsel for plaintiff improperly emphasized the paucity of plaintiff with the wealth of defendant, and without warrant in the evidence charged defendant's agents and employees with malicious conspiring to misrepresentation of injury, and otherwise directed the attention of the jury to extraneous matter which was properly be considered by them. It is the settled rule in this state that misconduct on the part of counsel of the character mentioned is sufficient cause for reversing a judgment unless it is apparent that it did not result in injury to the defeated party. Lucas v. Chicago City Ry. Co., 208 Ill., 231; Toledo, St. Louis & Western R. R. Co. v. Ingersoll, 208 Ill., 396; Illinois Cent. R. R. Co. v. Leiter, 216 Ill., 477; Chicago & Northwestern Ry. Co. v. Ward, 216 Ill., 487; Chicago & Eastern Illinois R. R. Co. v. Ward, 216 Ill., 497. These cases have been cited by this practice in which the courts have reversed or modified on account of the misconduct of the advocates in argument. It is unnecessary for us to review these decisions in detail. It is a matter resting in the sound discretion of the trial court to determine whether or not a new trial should be granted in such cases. Lake Shore & Michigan Southern R. R. Co. v. Ashby, 144 Ill., 499). But we may cite to the [illegible] case. Lucas, 208 Ill., 231, where this court will reverse a judgment because of improper

objections to such statements, rebuked counsel and directed the jury to disregard the statements," which was not done in the case at bar.

We are of the opinion that the improper arguments were of such a character as were likely to prejudice the court against defendant and that a new trial should be granted on that account, as well as for the errors previously mentioned.

The judgment of the Circuit Court is reversed and the case remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Barnes, J., concur.

21944

167 - 26336

JOSEPH T. DELPOSSE,
Appellant,

vs.

JOSEPH STOUT,
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

224 I.A. 639

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

Action was brought in the Municipal Court of Chicago by appellant against appellee upon a promissory note for $1500, executed by appellee, payable to his own order and by him endorsed in blank. The note is dated at Chicago, March 11, 1913, and became due and payable, with interest at six per cent per annum, ninety days after its date at 117 North Dearborn street, Chicago, which was then the place of business of the American Banking Association. The case was heard without a jury. There was a finding and judgment in favor of defendant, who is appellee here. A reversal is sought upon the ground that the judgment is manifestly against the weight of the evidence.

The amended affidavit of merits denied the existence of any indebtedness whatever on the part of plaintiff to defendant upon the note in question and denied that plaintiff ever demanded payment of said note from defendant. It is further averred that said note was given by defendant to the American Banking Association for money borrowed from said association; that it was paid after its maturity and during the year 1913 by means of a new note which defendant executed and delivered to the American Banking Association for the amount of the principal and accrued interest then due upon the note involved herein; that at the time the new note was given the note mentioned in the statement of claim was in the possession of said bank and that the renewal note has since been paid by defend-

ant.

We have carefully considered the evidence in the case, and do not consider it necessary to review the same in detail. We think that this evidence tended to sustain the allegations set forth in the amended affidavit of merits above indicated. At any rate, we cannot say that the judgment of the Municipal Court was manifestly against the weight of the evidence.

The judgment of the Municipal Court is therefore affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

2195a

2637/

198 - 26371

S. M. FORD,
Appellee,

vs.

FORD MANUFACTURING COMPANY,
a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

224 I.A. 639

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

Action was brought by appellee in the Municipal Court of Chicago to recover royalties alleged to be due him for the use of a patent cleat nail by appellant in connection with roofing materials manufactured and sold by it. The case was heard without a jury, resulting in a finding and judgment in favor of plaintiff for $3982.35 and costs, from which this appeal is prosecuted.

The amended statement of claim alleges in substance that on June 9, 1914, plaintiff had exclusive control of a certain patent on cleat nails and on that date agreed to allow defendant to use said cleat nails for a period of one year from June 9, 1914, in consideration of the payment by defendant of $900 for that privilege. It is also averred that on June 9, 1914, it was understood and agreed by the parties that if defendant desired to continue the use of said cleat nails after the expiration of said one year period, a new agreement would be made providing for the payment of a royalty thereon, which should not be less than five cents for each 288 nails used. It is next charged that defendant continued to use said nails from June 9, 1915, to December 31, 1916, during which period it used 25,545,159 nails; that the royalty thereon, computed at the rate of five cents for each 288 nails so used, amounts to $4261.50, and that after allowing credits amounting to $500, there is a balance due

plaintiff of $3761.50. The amended affidavit of merits denies the making of any agreement on June 9, 1914, providing for the payment of a royalty for the use of said nails after June 9, 1915, at the rate of five cents for each 288 nails used and denies the existence of any indebtedness whatever for royalties. It is also alleged as a further defense to the claim that plaintiff was a stockholder, director and vice-president of the defendant company and that on May 14, 1917, he sold all of his stock therein and at that time a complete accounting, adjustment and settlement was made between the parties; that the terms of the settlement were embodied in the written agreement of the parties dated May 14, 1917, to which reference is made, a certain item thereof being specified as showing the settlement of plaintiff's claim for royalties.

It appears from the foregoing statement of the pleadings that plaintiff relied upon an alleged express agreement between the parties providing for the payment by defendant to plaintiff of a royalty for the use of the nails after June 9, 1915, at the rate of five cents for each 288 nails used and that the existence of such an agreement is denied by defendant. In deciding the case the trial judge found that there was no such express agreement but held that defendant was liable under an implied agreement to pay the royalty at the rate demanded by plaintiff. We cannot agree with the learned trial judge in holding the defendant liable under this theory. Notwithstanding the general abolition of all formalities in pleading, it must be held to be the law in the Municipal Court, as elsewhere, that there can be no recovery except upon the cause of action alleged in plaintiff's pleading. The proof must correspond to and agree with the allegations of the statement of claim. An averment of an express agreement to pay royalties at a specified rate is

plaintiff of $1741.50. The amount litigated at twenty-seven
dollars of the agreement on June 7, 1911, providing for the
payment of a royalty for the use of this media after June 8,
1911, at the rate of five cents for each 100 media used and
giving the existence of the instrument obligating the defendant.
It is also alleged as a further defense on the ground that plain-
tiff was a stockholder, director and vice-president of the defend-
ant company and then on July 14, 1911, he sold all of his stock
therein and at that time a complete accounting, adjustment and
settlement was made between the parties; that all the terms of the
settlement were embodied in the written agreement of the parties
dated July 14, 1911. In this instance is moot, a material issue
thereof being specified as bearing on the existence of plaintiff's
claim for royalties.

It appears from the foregoing statement of the plaintiff
that plaintiff rights upon an alleged tortious breach
between the parties providing for the payment by defendant to
plaintiff of a royalty for the use of his media after June 8,
1911, at the rate of five cents for each 100 media used and that
the existence of such an agreement is denied by defendant. In
holding the same the trial judge found that there was no such
express agreement but that that defendant was liable under an
implied agreement to pay the royalty at the rate demanded by
plaintiff. We cannot agree with the learned trial judge in
holding the different minor contracts invalid. Assuming
the general qualifiers of all transactions in question, it must
be held to be the law in the instant case, in addition, that
there was in an enforcing sense upon the issue of action alleged
in plaintiff's pleading. The point most strenuously is not agree
with the allegations of the statement of claim. In reference to

not sustained by evidence of matters from which the law will imply a promise to pay. Trunkey v. Hedstrom, 131 Ill. 204; Frazer v. C. B. & Q. R. R. Co., 185 Ill. App. 455. Undoubtedly plaintiff offered to allow defendant the continued use of the patented article upon payment of a royalty of five cents for each 288 nails used, but he did not advise defendant that he would assume acceptance of his offer, in case defendant did not reply thereto. Assent cannot be assumed merely because no express refusal of the offer is shown on the part of defendant. Defendant's silence was not sufficient to charge it with a contract. 1 Williston on Contracts, 91a. When an offer is made to one who remains silent, the silence may be due to a variety of causes.

The evidence shows that at the time these transactions took place plaintiff was a large stockholder and director and an executive officer of the defendant company. Prior thereto he had urged his associates in the corporate business to acquire control of the patent on cleat nails, which they had declined to do. Thereupon plaintiff secured control of the patent in his own name under an agreement to pay the patentee a royalty of one cent for each 288 nails used. He then induced his associates in the management of the company to give the nail a trial, and an agreement was reached on June 9, 1914, whereby defendant was allowed to use the article for one year on payment to plaintiff of the sum of $900. This agreement was embodied in a letter from plaintiff to defendant dated June 9, 1914, and a letter from defendant to plaintiff accepting the terms offered. Plaintiff's letter of June 9, 1914, among other details expressly states that the agreement covered a period of one year only, in the following language:

not excluded by evidence of matters from which the jury might imply a promise to pay. Fletcher v. Bullions, 121 Ill. 244; Fleet v. Hegeman, 14 Wend. 267 (N.Y. 1835). Consequently plaintiff offered to allow defendant the reasonable use of the painted articles upon payment of a royalty of five cents for each 500 meals used, but he did not notify defendants that he might assume acceptance of his offer, in case defendant did not reply thereto. Assent cannot be assumed merely because the recipe refused of the offer is known on the part of defendant. Defendant's silence was not sufficient to change it into a contract. 1 Williston on Contracts, 81. When an offer is made to one who receives silent, the silence may be use to a contract of sorts.

The evidence shows only at the most that defendants had plans plaintiff was a large manufacturer and distributor and an engaging artist of the Gorham company. Prior thereto he had kept his associates in the industrial territory by arranging several of the paints on short meals, which they had distributed to it. Therefore plaintiff received knowledge of the paints in his own home during an experiment to test the existence a reversal of one hot for each 500 meals used. In item indicate his association in the manufacture of the product in view to sell a paint, and as stated was realized on July 7, 1941, thereafter defendant was claimed he was the artists for the per pro ex property of plaintiff of the use of paint. This agreement was modified in a letter from plaintiff to defendant dated June 9, 1941, and a letter from defendant to plaintiff assuming the terms offered. Plaintiff's letter of June 9, 1941, among other matters expressly states that the agreement covered a period of one year only. In the following paragraphs

"Now it is fully understood under the above arrangement I am only letting the company use the nail for one year from this date. After that time if the company wishes to continue the use of this patent nail other arrangements will have to be made that will be satisfactory to us both."

There was no further mention of the matter until sometime in July, 1915, when it was a subject of conversation between the parties at Vandalia. There was another conversation at Chicago in October, 1915. On these occasions nothing definite was agreed upon as to the continued use of the nail by defendant. Plaintiff was then demanding a royalty of ten cents for each 288 nails, to which defendant objected. Thereupon plaintiff told defendant to discontinue the use of the nails. The subsequent negotiations between the parties seem to have been conducted entirely by letter. On March 14, 1916, plaintiff wrote to defendant stating his position in detail with reference to the subject-matter. In this letter he expressed himself in part as follows:

"It seems to me that I should, in order to carry on other work that I am doing, get something for the use of this nail. I invested my own money in this nail after it was turned down by the other members of the company. Whereas under ordinary conditions I would feel that it was not worth while bothering with, at the same time now I need money for other things and I am going to take up and see if we can come to an arrangement where the company may continue using this nail by paying me a royalty. I think a royalty of between 5 and 10 cents a square would be close to right and I think at that rate it would be producing me an income that would be more than enough to take care of the necessary expenses I am being put to in carrying to a successful conclusion other inventions that I may have. * * * In addition to this it would not be necessary that the company show that I owed them money, or that they were loaning me money. I would feel a great deal better about it, because I would not then have to return to the company what I borrowed from them, for the reason that the money would be my own from the royalties of this patent. * * * I feel that I have done more than my share and I feel that there is a great many ways that I can increase my income and this is one, and in doing this I would not feel that I had to be particularly careful in case I made applications and searches in working out other patents. * * * On my previous talk with you I thought it would be agreeable that the company would loan me what

"You do in fact overcome your the same arrangement I am only letting the tongue are the well for one year from this date. After that time if the company wishes to continue in the use of this patent well then arrangements will have to be made that will be satisfactory to us both."

There was no further mention of the matter until November 15 1878, when it was a matter of correspondence between the parties at Toronto. There was another conversation in Detroit in October, 1879. In these negotiations Bell's was spread upon us to the continued use of the wall by outsiders. Finally was then demanding a royalty of ten cents for each 100 ends, to which defendant objected. Thereupon plaintiff asks defendant to discontinue the use of the wall. The subsequent negotiations between the parties have to have been somewhat confusing by nature. On March 3d, 1880, plaintiff wrote to defendant setting the profits at $1000 with defendant to the negotiations. In this letter he expressed himself in part as follows:

"I'm sorry to see that I should, in order to carry on either wall that I am taking, you insisting for the sum of this wall. I inserted my own money in this wall after it was turned down by the other members of the company. Therefore under previously conditions I sought that that it was not worth while bothering with, as the time also for I have lately for other things was I the same to look on and see it or not then to be overpowered where the company may continue using this wall by paying me a royalty. I think a royalty of between 7 and 10 cents a month would be close to right and I think it is the wall it would be productive on the lowest that would be quite enough to take care of the monetary expenses I am being put to in carrying on a mechanical experiment. Either Dalrymple or I must have to be willing to continue the company when that it would not be necessary that the company when that I made that every, so that they now treating me badly. I would rather I never was talked about it, however I would be sorry, but time is taken in the company. I would not have I never, for the reason that the money that I borrowed from them, for the reason that the money would be my own from the receipts of this patent. I'm I first that that I have done more than my share and I find that there is a great deal more that I can do and have to do and this is all. And in fact that I would not have thus I am in the possibility according to note I have made utilizations and matters in written not other matters. I'm I'm for arranging this with you I thought

> little additional money I needed, as it would only be temporarily and they absolutely could not lose and they had every prospect if I would be successful, that they would get something or some good from it."

On March 24, 1916, plaintiff again wrote to defendant stating that after the first of the month (meaning April 1, 1916), the company must make new arrangements with him as to whatever nails they used and that he intended to charge a royalty of five cents per roll of roofing and that otherwise the company must discontinue using the nails. The letter was imperative in demanding an immediate reply. These letters show conclusively that for a long time after June 9, 1915, and as late as March 24, 1916, no arrangement had been made for the use of the nails after June 9, 1915, and the last letter shows that plaintiff demanded that a new arrangement be made commencing April 1, 1916. Plaintiff's letters also indicate that he was urging defendant to continue the use of the nail because of the benefit which would thereby accrue to him personally. He argued from the standpoint of his own financial condition and was seeking to obtain a substantial pecuniary return for himself regardless of whether or not the continued use of the nail was for the benefit of the company. He employs no arguments predicated upon the welfare of the company. The correspondence on the part of plaintiff discloses no belief on his part that the new agreement would benefit the company, but he is explicit in showing that it would be of great advantage to himself. He seems to overlook the possibility that in urging this transaction he was committing a breach of his duty as a director and officer of the company. Directors are not permitted to place themselves in a position where their own individual interest will prevent them from acting for the best interests of those they represent. The rule includes every relation in which there may possibly arise a conflict between the duty of the director or officer to his company and his own individual interest. It has been said, "The

general rule stands upon our great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self interest and integrity. * * It acts not on the possibility that in some cases the sense of that duty may prevail over the motives of self interest, but it provides against the probability in many cases, and the danger in all cases, that the dictates of self interest will exercise a predominant influence and supersede that of duty." G. C. & S. R. R. Co. v. Kelly, 77 Ill. 426; Farwell v. Pyle-National Headlight Co., 289 Ill., 157.

On March 27, 1916, defendant wrote to plaintiff acknowledging the receipt of plaintiff's letter of the 24th and notifying plaintiff that the company had discontinued the use of the nail, finding the cost of the nail and plaintiff's royalty requirement to be prohibitive. This letter suggests the propriety of allowing defendant the privilege of using up the nails on hand and reminds plaintiff that if he expected the company to discontinue the use of the nails on the first of the following month he should relieve the company of its stock of nails then on hand. The receipt of this letter was acknowledged by plaintiff on March 30, 1916, and in the course of that letter he reiterates his desire that the company should discontinue the use of the nails from and after April 1, 1916, and says, in substance, that he will probably be able in a short time to arrange to take the nails previously purchased by the company off the hands of the company, giving it at least the cost price of the nails. There was some further correspondence in which plaintiff makes additional attempts to induce defendant to continue the use of the nail, and defendant states quite at length its objections to so doing, and among other reasons mentions the receipt of a great many complaints on account of the nails causing leaks,

general rule stands upon one great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self interest and integrity. * * It rests not on the possibility that in some cases the sense of duty may prevail over the motives of self interest, but it provides against the probability in many cases, and the danger in all cases, that the dictates of self interest will exercise a predominant influence and supersede that of duty." [illegible] v. Daly, 77 [illegible]; [illegible] v. [illegible], [illegible].

On March 27, 1919, defendant wrote to plaintiff acknowledging the receipt of plaintiff's letter of the [illegible] and notifying plaintiff that the company had discontinued the use of the mails, [illegible] plaintiff's supply requirements [illegible]. This letter suggests the propriety of allowing defendant the privilege of using up the mails on hand and requests plaintiff that if he expected the company to discontinue the use of the mails on the first of the following month he should relieve the company of its stock of mails then on hand. The receipt of this letter was acknowledged by plaintiff on March 28, 1919, and in the course of that letter he reiterates his demand that the company should discontinue the use of the mails from and after April 1, 1919, and adds, in substance, that he will probably be able in a short time to arrange to take the mails previously purchased by the company off the hands of the company, either [illegible] the [illegible] price of the mails. There was some further correspondence in which plaintiff makes additional attempts to [illegible] to [illegible] the use of the mails, and defendant [illegible] to [illegible], and among other reasons assigns the receipt of a [illegible]

which had imposed upon the company considerable expense. This correspondence continued during the months of April and May, 1916, and was devoted principally to a discussion of the basis of a settlement of the royalty account, as well as other matters in controversy between the parties. On March 1, 1917, defendant wrote to plaintiff enclosing a statement showing the amount of nails purchased by the company, including the nails which it then had on hand. This letter called attention to the fact that under the original agreement with plaintiff the royalty on the total nails purchased would be $993.81; that payments had been made on this account amounting to $500, leaving a balance due of $493.81, and stated that plaintiff's account would be credited with that amount. It appears from a letter dated March 26, 1917, from defendant to plaintiff, which was offered in evidence as plaintiff's exhibit 27, that defendant therein claimed that it had given to plaintiff credit for the full amount of all nails, both used and unused, which the company had ever purchased, and disclaimed any indebtedness whatever on the part of defendant to plaintiff. The letter further states as follows:

> "On February 23, 1917, you drew checks against this company in the aggregate sum of $4165.85 alleged to be for royalties on cleat nails. These checks greatly exceeded any sum that was owing you from this company and we so notified you at the time, and in accordance with that notice we have charged your account with the amount of the duplicate vouchers then drawn by you - $4165.85 - and credited you with the amount of royalties due you, which is $493.81."

Plaintiff testified that he had drawn sundry checks for $50 each, aggregating the amount of $4165.85, and that the checks had been drawn for the amount of $50 each, because at that time he had authority to sign checks countersigned by the bookkeeper for amounts up to $50 only, but when checks were in excess of $50 they were signed by officers of the company. In other words, plaintiff admitted that he had taken advantage of this authority

which had between them the company relationship commenced. This correspondence continued during the months of April and May, 1919, and was totally prejudicial to a determination of the merits of a settlement of the royalty account, or will in other words involve in controversy between the parties. On March 3, 1917, defendant wrote to plaintiff enclosing a statement showing the amount of sales produced by the company, including the sales which it claimed had to have. This letter called attention to the fact that under the original agreement with plaintiff the royalty on the total sales produced would be $777.83; that royalty had been made on this account amounting to $[illegible], leaving a balance due of $[illegible], and stated that plaintiff's account would be credited with that amount. It appears from a letter bearing date Mar. 3, 1917, from defendant to plaintiff, which was effect is evidence on plaintiff's behalf (T. 30-) defendant claiming that it had given to plaintiff credit for the full amount of all sales, both used and unused, which the company had ever produced, and disclaimed any indebtedness whatever on the part of defendant to plaintiff. The letter further states as follows:

> "In reference to that, you give credit against royalty claimed by the plaintiffs amount of [illegible] allowed in the negotiations at Cleveland. Now we submit that the sales actually made are the ones upon which we are asking you to credit royalty and we do not think you, in the case, are in conformity with that notion. We have charged your account with the amount of the royalties according to your terms of [illegible] and credited you with the amount of royalties for the sales which is $[illegible]."

Plaintiff contended that it had given another credit for the sales, corresponding the amount of $[illegible], and that the credits had been issued for the amount of the sales. Testimony of that kind was not material to make the sales manufactured by the defendant for which royalty is to be paid, but some sales were in excess of the royalty were allowed by agreement of the company. In many cases, plaintiff contends that in the [illegible] of [illegible] defendant

to pay himself the royalties which he claimed, regardless of the fact that the company had never agreed to pay such royalties and that no agreement had been reached regarding the company's use of the nail after June 9, 1915.

The record shows that in the early part of 1917 the relations between plaintiff and defendant were no longer harmonious and amicable. On May 14, 1917, plaintiff entered into an agreement with defendant providing for the sale of all the capital stock of the company owned by plaintiff, being 4066.4 shares, for the price of $103 per share. This agreement provided for the payment by defendant to plaintiff of the purchase price, amounting to $418,839.20, partly in cash and the balance by the transfer of property, the adjustment of accounts between the parties and certain notes evidencing deferred payments. Among other items with which plaintiff is charged and for which defendant received credit upon the transaction is the following: "S. M. Ford dividend account paid in advance by checks issued by S. M. Ford, $962.87." It is claimed by defendant that this item represents the final adjustment of the royalty account, as well as the dividend account between the parties. We had occasion to consider the same identical contract, and this particular item thereof in a former case between the same parties (Ford v. Manufacturing Company, No. 26279), and then found that this item, taken in connection with other evidence in the case, constituted an admission on the part of plaintiff that he was not entitled to dividends upon the stock sold by him after April 1, 1917. We are unable to determine whether or not this particular item should be regarded as a settlement of the royalty account as well as the dividend account between the parties without a greater attention to the minutiae of bookkeeping and a more detailed analysis of the accounts between the parties than we

feel justified in undertaking. Upon a careful consideration of the entire record, we cannot concur in the finding of the trial court that there was an implied obligation on the part of the company to pay the royalty at the rate specified in plaintiff's statement of claim.

The judgment of the Municipal Court is therefore reversed and the cause remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Barnes, J., concur.

219 - 26392

SIMON KASTERLIK,
Appellee,

vs.

RUDOLF SCHWALB,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

224 I.A. 640

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

The statement of claim in this case alleged that there was a balance due to plaintiff from defendant on a running account for sundry liquors sold by plaintiff to defendant. The account began with a debit balance on January 23, 1918, which had arisen from prior transactions. It covered transactions between the parties during a period of about eight months, ending September 13, 1918, and included numerous debits and credits. The amended affidavit of merits admitted that there was due to plaintiff a net balance of $348.12 and averred that plaintiff was entitled to a credit of $500.01 arising from a guaranty as to goods sold, which plaintiff gave to defendant on or about May 8, 1918. By this guaranty it is alleged that plaintiff induced defendant to purchase from him ten barrels of whiskey for the sum of $639 at an agreed price of $1.75 a gallon. This whiskey was then stored in a bonded warehouse and was represented by plaintiff's invoice and warehouse receipts therefor. It is alleged that plaintiff guaranteed the whiskey as being sound, of agreeable smell and taste and fit for sale to consumers at retail, and further agreed to rescind the sale and take back the whiskey in case it failed to comply with such guaranty and to promptly furnish other whiskey which would comply with the guaranty at the same price per gallon. Plaintiff also agreed to repay or credit defendant for the re-

[illegible]

[illegible]

[illegible]

jected whiskey at the contract price. Relying upon this guaranty, and prior to the receipt of any of the whiskey, defendant paid plaintiff the entire purchase price for the ten barrels in question. Thereafter, on or about June 8, 1918, defendant received three barrels of the whiskey and found, upon opening one of them, that the contents did not conform to the guaranty. Defendant at once notified plaintiff of this fact. Some two days afterwards the parties agreed to rescind the sale except as to the barrel which had been opened. Plaintiff then repeated his promise to take back the balance and to furnish whiskey of the guaranteed variety. Plaintiff did take back the two remaining unopened barrels and afterwards furnished two barrels of satisfactory whiskey at the contract price. This was a partial fulfillment of his guaranty. The affidavit of merits further alleged that as to the remaining seven barrels plaintiff failed to substitute other whiskey or to repay or credit defendant for the value thereof at the contract price per gallon, amounting to $500.01.

Before the case was reached for trial on its merits the court, upon plaintiff's motion, struck the amended affidavit of merits from the files and denied defendant's motion for leave to file another amended affidavit. Thereupon judgment was entered in favor of plaintiff and against defendant for $937.13 for want of a sufficient affidavit of merits. A motion in arrest of judgment was denied. A subsequent motion of defendant to vacate the judgment was also denied.

The only question before this court is, whether or not the affidavit of merits sufficiently stated a defense to the suit, under the provisions of the Municipal Court act with reference to pleadings in fourth class actions. The character of the pleadings required by the respective parties in fourth class actions has received the consideration of the Supreme Court in a number of cases.

In Sher v. Robinson, 208 Ill. 181, it was held that it is not necessary that plaintiff's statement of claim should allege all the facts necessary to be proved on the trial. It is sufficient if such statement reasonably informs the defendant of the nature of the case he is called upon to defend. It has also been held repeatedly that the defendant is required only to disclose by his affidavit of merits the nature of his defense, specifying the nature thereof by way of denial or by way of confession and avoidance in such a manner as to reasonably inform the plaintiff of the defense which will be interposed at the trial. American Hard Rubber Co. v. Howe, 280 Ill. 431; Edgerton v. Chicago, Rock Island & Pacific Ry. Co., 240 id. 311. We are of the opinion that the affidavit of merits in this case conforms to the requirements indicated by the foregoing authorities and that the Municipal court should have heard the case upon its merits.

The judgment of the Municipal court is reversed and the case remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Barnes, J., concur.

In Ohio v. Dentler, 324 U.S. 192, it was held that it is not necessary that the plaintiff's statement of claim should allege all the facts necessary to be proved on the trial. In it [illegible] it was stressed particularly between the defendant of the nature of the case to be tried upon in detail. It has also been held recently that the defendant is required only to disclose by his pleadings or verbal bill before of his defence, specifying the course followed by any at denial or by any or contradiction and evidence to prove a plaintiff to be treasonably taken the plaintiff at the trial. [illegible] -121 to [illegible] place at the trial. Mississippi Short Lumber Co. v. Lumber, 287 F.2d. [illegible] Sheridan v. Chicago, Rock Island & Pacific Co. (D.), 24 F.R.D. 12. We are of the opinion that the affidavit of service in this case meets the requirements indicated by the foregoing authorities and that the motions must be denied. [illegible] the judgment of the District Court is reversed and the motion sustained.

Reversed and remanded.

Entered: J. J. del Toro, C. J., [illegible].

240 - 26413

ISABELLA MANDEL, FREDERICK L. MANDEL, ROBERT I. MANDEL, as trustees under the will of LEON MANDEL, deceased, ISABELLA MANDEL, BLANCHE M. STRAUSS, GERHARD FORMAN, FLORENCE MANDEL, MADELINE FORMAN, LOUISE W. WINEMAN, IDA M. MANDELBAUM, as individual, Appellants, vs. FERDINAND HOTZ, Appellee.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

224 I.A. 640

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

Appellants brought an action of covenant against appellee in the Circuit Court of Cook County to recover the sum stipulated to be paid as liquidated damages in case the tenants held possession of certain demised premises after the expiration of the term of the lease. Appellee had guaranteed the faithful performance of the lessees' covenants in the lease. The declaration alleged the making of the lease in question and that the lessees had held over for a period of thirty-one days after the expiration of the lease. It also set forth the terms of the guaranty and the covenant contained in the lease to pay to the lessors $25 per day as liquidated damages in case of holding over. The pleas averred that lessees had paid the rent for the entire time during which they occupied the premises and had surrendered possession of the premises in a good state of repair.

The term of the indenture was from May 1, 1917, to April 30, 1918. The rent reserved was $375 per month. The lessees surrendered possession of the demised premises on May 31, 1918. The seventh paragraph of the lease in question provided that at the expiration of the term the lessees should yield up immediate possession of the premises to the lessors,

and failing so to do, said lessees agreed to pay to the lessors, as liquidated damages for the whole time such possession should be withheld, the sum of $25 per day. There was attached to the lease a written agreement whereby defendant guaranteed the faithful performance by the lessees of all the agreements and covenants in the lease which were to be kept and performed by them. Plaintiffs claim an indebtedness of $781, which included the amount of the liquidated damages above specified and an expense of $6 incurred by plaintiff in removing a sign which defendant had left upon the demised premises.

The evidence shows that on May 4, 1918, plaintiffs' agent wrote to defendant advising him of his liability to pay at the rate of $25 per day for each day that the tenants withheld possession of the premises. On May 8, 1918, plaintiffs wrote to the lessees acknowledging receipt of their check for $375. The letter reminded the tenants that they had failed to notify plaintiffs as to whether or not the tenants desired to re-rent the premises after the expiration of the present lease and that therefore plaintiffs had notified Mr. Hotz, the guarantor, that they would not accept the lessees as future tenants, unless Mr. Hotz would guarantee the rent and that unless satisfactory arrangements were made, plaintiffs would elect to treat their former tenants as trespassers at the <u>penalty</u> rate provided in the lease of $25 per day. The letter further advised the lessees that plaintiffs would hold their check for $375 as against <u>this penalty of $25 per day</u> subject to the order of Mr. Hotz, "but under no circumstances do we retain the same as rent." This letter indicates that plaintiffs regarded the seventh paragraph of the lease as a provision for a penalty rather than for liquidated damages. While appellants disclaimed in explicit language the theory of the acceptance of the check in payment of rent, their letter seems to indicate that it was accepted in satisfaction of the

penalty imposed by the lease. At any rate, the check was accepted and was never returned by appellants to appellees. There was some further correspondence regarding the matter in the course of which defendant notified plaintiffs that he would not be guarantor under another lease and would not hold himself liable for any further penalties. No reply to this letter is shown by the record.

A reversal of the judgment is sought upon the ground that the jury were actuated by malice in returning their verdict and that the verdict was contrary to the weight of the evidence. The record does not show any assignment of error based upon the misconduct of counsel for appellee or that the verdict was the result of passion or prejudice. No errors are alleged in the court's rulings upon questions of evidence or upon instructions given or refused. Under these circumstances we are bound to conclude that appellants seek a reversal solely upon the ground that the judgment is manifestly contrary to the weight of evidence.

We cannot sustain this contention. The evidence shows that the tenants paid and plaintiffs accepted the sum of $375 on or about May 8, 1918. Doubtless this payment was made by the tenants with the intention of thereby discharging their obligation for rent for the month of May, 1918, and all other obligations imposed upon them by the terms of the lease. Plaintiffs stated in their letter that they would not accept the payment as rent but did not refuse to accept the same in discharge of all obligations imposed upon the tenants by the terms of the lease. They did not return the check or its proceeds and we think that by its acceptance they are precluded from maintaining this action.

The judgment of the Circuit Court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

[illegible] imposed by the Jurors. In any case, our views are accepted and our errors rectified by judicial review in appellate courts and from further constitutional questions regarding the matter in the course of which defendants petition validity that he would not be prosecuted under another issue and would not that identify liable for any further [illegible]. We trust in that belief of above by the jurors.

A reversal of the judgment is sought upon the ground that the jury were entitled to which be instructed that [illegible] and that the verdict was contrary to the weight of the evidence. The record does not show any exception of error based upon the misconduct of counsel for omission or that the verdict was the result of passion or prejudice. We errors are filed in the majority relieve some questions of evidence or upon instructions given or refused. Under these circumstances we are loath to conclude that appellants made a [illegible] clearly upon the ground that the judgment is manifestly contrary to the weight of evidence.

We suppose mistake take consideration. The [illegible] that the trouble said and plaintiffs [illegible] the [illegible] of [illegible] as of about July 8, 1918. Defendant's [illegible] was made by the [illegible] with the [illegible] of [illegible] [illegible] for work for the month of May, 1918, and all other [illegible] [illegible] [illegible] by the [illegible] of the [illegible]. Plaintiffs stated in their [illegible] that they would not receive the [illegible] in [illegible] [illegible] and [illegible] to assign the cause in [illegible] of all [illegible] [illegible] upon the [illegible] by the jurors. They did not [illegible] the [illegible] or its [illegible] and we think that by the [illegible] [illegible] they are precluded from [illegible] this [illegible].

The judgment of the [illegible] Court is affirmed.

AFFIRMED.

[illegible], P. J., and [illegible], J., CONCUR.

21484

21486

262 - 26436

W. D. JOHNSON,
Appellant,

vs.

FRANK C. PATTEN and
T. T. WATSON,
Appellees.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

224 I.A. 640

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

This is an action of trespass on the case brought in the Circuit court of Cook County by appellant against appellees to recover damages alleged to have been suffered by plaintiff by reason of the acts of defendants in fraudulently inducing plaintiff to loan them $3,000, for which defendants gave their collateral note secured by bonds of the Caxton Investment Company of the par value of $5,000. These bonds were described in the note as "a first mortgage lien" on certain real estate in St. Louis, Missouri. It is charged that defendants represented to plaintiff that the St. Louis property was worth more than $100,000 and that the bonds were a first lien thereon, while the undisputed facts were that the property was worth approximately $27,000 and was subject to a first mortgage lien of $15,000 and accrued interest. Pleas of the general issue and of the statute of limitations were filed. There was a jury trial resulting in a verdict and judgment in favor of defendants.

Appellant urges numerous errors as grounds for reversal, but relies particularly upon certain instructions given at the request of defendants, which are alleged to be erroneous and therefore prejudicial to plaintiff.

We have carefully examined these instructions and find that in one of them the court instructed the jury, in substance, that the burden was upon plaintiff to prove that the bonds delivered

[illegible] - Paris

[illegible]

[illegible]

[illegible]

to him by defendants were worthless on July 17, 1913, the date of their delivery, and that there was no presumption that mortgage bonds are worthless, but that plaintiff must show by a clear preponderance of evidence that they were worthless, and further, that plaintiff, in order to recover, must show and prove that defendants knew that said bonds were worthless. The declaration does not allege that the bonds were worthless, and the evidence shows that they had some value. If the jury followed this instruction literally, it would have been impossible for them to find for plaintiff under any circumstances. The verdict indicates that the jury were influenced by this instruction. The true measure of damages in a case of this kind is the difference between the actual value of the bonds at the time and place in question and their value as represented by defendants. We are of the opinion that the court erred in giving this instruction.

In the next instruction the jury are advised that plaintiff must prove that his proceedings in making the loan were conducted with due caution on his part and that the jury must weigh all the circumstances and facts in the case for the purpose of determining whether or not plaintiff did proceed with due caution in making the loan to defendants. In the absence of any instruction accurately defining what is meant by the expression "due caution," we are of the opinion that this instruction was calculated to mislead the jury, as it left to them the determination of a legal question, which is beyond their province.

The court also instructed the jury as to the time when the statute of limitations commenced to run in the case and informed the jury in substance that if they found that the statements made by defendants as to the value of bonds were false and that all such statements were made more than five years prior to the beginning of

the suit, then the jury must find defendants not guilty, unless they further found that defendants wilfully concealed from plaintiff the falsity of such statements. We regard this instruction as an erroneous statement of the law upon the subject. The statute commenced to run from the time when the money was paid by plaintiff to defendants, unless its operation was prevented by a concealment of the cause of action by defendants, in which event the action may be commenced at any time within five years after the person entitled to bring the same discovers the existence of the cause of action. R. S., chap. 83, sec. 22. The question as to whether or not there was any such concealment was not raised by the pleadings in the case. The evidence does not show that there was any such concealment, but on the other hand shows that plaintiff examined the mortgaged property within a very short time after the consummation of the loan. It is apparent that this instruction did not accurately state the law applicable to the issue raised by the plea of the statute.

This feature of the case was still further complicated by another instruction, in which the court advised the jury that the cause of action in this case arose when the false statements, if any, were made by defendants to plaintiff and when plaintiff, relying on the same, paid out the moneys on the note. The effect of this instruction was to inform the jury that there might be two different dates when the cause of action arose. It is contradictory to the prior instruction, which indicated that the statute commenced to run when the alleged false statements were made. We think it apparent that the jury must have been confused and misled by these conflicting instructions. In still another instruction upon the same subject the court stated to the jury that the bar of the statute of limitations can <u>only</u> be removed if the defendants who are liable in such action fraudulently concealed the cause of said action from

the knowledge of the person entitled thereto.

The jury were also instructed, in substance, that in this case the statute of limitations began to run "when the conspiracy between the defendants, if any there were, was complete. That is, when defendants obtained the money from plaintiff, as alleged, by making false statements to him." The question of the existence of a conspiracy to defraud plaintiff was not involved in the case. The instruction last mentioned indicated a third date when the statute of limitations commenced to run in this case. The effect of all these instructions was to leave the minds of the jury in a hopeless state of confusion as to when the statute commenced to run, thereby rendering it impossible for them to pass intelligently upon the issue raised by the plea of the statute.

In view of these errors in the instructions given by the court at the request of defendants, the judgment must be reversed. It will therefore be unnecessary for us to consider the other grounds for reversal urged by appellant which are predicated upon the evidence in the case.

The judgment of the Circuit court is reversed and the case remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Barnes, J., concur.

2147a

293 - 26467

EMMA KIRSCHBAUM,
Appellee,

vs.

HERMAN F. BURR and
SARAH B. BURR,
Appellants.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

224 I.A. 640

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for $500 entered in the Circuit Court of Cook County against appellants and in favor of appellee, who was plaintiff in the court below. The action was based upon a certain promissory note executed by defendants dated May 1, 1917, and payable to the order of plaintiff one year after date. A plea of the general issue was filed and notice given of special matters of defense, which were stated to be that the note was given without consideration so far as the defendant Sarah B. Burr is concerned and that as to the defendant Herman F. Burr, there had been a failure of consideration. There was a jury trial.

The evidence shows that the note in question was given in part payment for a stock of goods sold to defendants. The entire purchase price agreed to be paid was $1,000, of which $500 was paid in cash and the balance was evidenced by the note in question. There was some evidence tending to show that the valuation of $1,000 placed upon the goods in question was excessive, but it is apparent that the purchasers had a full opportunity to examine the goods before completing their purchase and that the price of $1,000 was agreed to by them. It is claimed by appellants that the trial court erred in rulings upon the evidence, but we find no reversible error in that respect. The judgment of the Circuit Court was not

manifestly against the weight of the evidence.

It is also urged by appellants that the court erred in instructing the jury, in substance, that the burden of proof was upon defendants to sustain their plea of a failure of consideration; that such defense must be established by a preponderance of the evidence and that if the jury were unable to say on which side is the greater weight of the evidence upon that issue, the verdict should be for the plaintiff. There can be no question but that the burden of proof upon this subject was placed upon the respective defendants, who alleged the want and failure of consideration. Under the provisions of the Negotiable Instruments Act every negotiable instrument is deemed prima facie to have been issued for a valuable consideration. R. S., chap. 98, sec. 42. The burden of proving the want of consideration was on defendants. Bechtel v. Marshall, 207 Ill. App., 329; Chicago Title & Trust Co. v. Ward, 113 id., 327. It follows that if the party upon whom the burden is placed fails to sustain his allegations by a preponderance of evidence the judgment must be in favor of the opposing party. Barretta v. Chicago Rys. Co., 214 Ill. App., 455, and cases cited.

The judgment of the Circuit Court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

sufficiently against the weight of the evidence.

It is also urged by counsel for the court below in instructing the jury, in substance, that the burden of proof was upon defendants to establish their plea of a failure of consideration; that such defense must be established by a preponderance of the evidence and that if the jury were unable in any so which is the greater weight of the evidence upon that issue, the verdict should be for the plaintiff. There can be no question but that the burden of proof upon this issue placed upon the respective defendants, who alleged the same and failure of consideration. Under the provisions of the Negotiable Instruments and Uniform Negotiable Instruments Law, adopted by Texas, it has been issued for a valuable consideration. R. S., chap. 96, sec. 16. The burden of proving the fact of consideration was on defendants. Bankhead v. Chatfield, 87 Tex. 171, 27 S.W. 1061; Chicago Title & Trust Co. v. Cox, 147 S.W. 1147. It follows that if the court upon the evidence in issued Texas to sustain his contention by a preponderance of evidence the judgment must be in favor of the appellee. Barrett v. Gibson, 90 Tex. 154, 36 S.W. 417, and cases cited.

The judgment of the lower court is affirmed.

Affirmed.

Keeling, J., J., and Bonner, J., concur.

22000

26490

316 - 26490

MAGDALENA WILHELM,
Appellee,

vs.

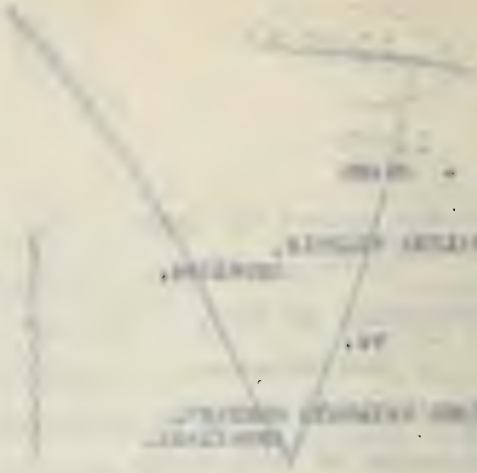
CHICAGO RAILWAYS COMPANY,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

224 I.A. 640

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

This action was brought by the appellee as plaintiff to recover damages which she claims to have sustained as a result of injuries received in a collision between one of the defendant's cars in which she was a passenger and a coal wagon. The amended declaration contains three counts. In the first count it is charged that while plaintiff was a passenger in the exercise of ordinary care for her own safety upon an electric car operated by defendant, at or near the intersection of Noble street and North avenue in Chicago the servants of defendant in charge of the car so recklessly, carelessly and negligently operated the car that it collided with a vehicle or wagon being driven near the car in North avenue, whereby divers parts of the car were brought into violent contact with the wagon and "thereby plaintiff's body came into violent contact with the said electric street car and said vehicle, and she was thrown against divers parts of said electric car and said vehicle and against divers other objects there and to and upon the ground," resulting in the injuries complained of. The second and third counts contained similar allegations but charged defendant Herman J. Troch with the ownership and operation of the wagon in question and with negligence in its management, thereby causing the injury in question. The case was dismissed as to the defendant Troch so that it is unnecessary to state the



allegations against him with any greater degree of particularity. There was also an averment that because of the injuries sustained by plaintiff as the result of the accident she was prevented from doing her household duties as a housewife and incurred certain expenses in being cured of her injuries. The defendant, Chicago Railways Company, filed a general and special demurrer to the declaration, of which no disposition seems to have been made. There was a jury trial, resulting in a verdict of $2,000. A remittitur of $500 was filed and thereafter judgment was entered for $1500 and costs. A reversal of this judgment is sought upon the ground that the judgment is manifestly contrary to the weight of the evidence and is excessive and based upon a verdict which was the result of passion and prejudice upon the part of the jurors.

The evidence shows that at the time of the accident plaintiff was a married woman; that she was forty-three years of age and resided with her husband and family and that she weighed from two hundred to two hundred and forty pounds. Plaintiff testified that she was riding on a west bound car on North avenue on the afternoon of January 17, 1917; that the accident occurred at about three o'clock P. M.; that she was sitting on the left or south side of the car some distance back from the front of the car. Her testimony as to the facts and circumstances surrounding the accident is of but little value. It was, in substance, to the effect that when the window glass was broken she received a jerk and thereupon lost consciousness, from which she did not recover until about ten o'clock in the evening of the day in question. The only other witness who testified on behalf of plaintiff was the driver of the coal wagon mentioned in the declaration, a servant of the defendant Troch, who had previously been dismissed out of the case. This witness stated that he was

going west on North avenue with a load of coal. When in the vicinity of the intersection of Holt street and North avenue he was on the north track, being the track used by west bound cars, and was pulling his wagon and team out of the track. When the front part of the wagon was practically out of the north track, the rear end of the wagon slipped a little and the car bumped into the wagon. He further testified that when the motorman first sounded the bell warning him to get out of the north track, the car was one hundred and fifty feet away and that at the time when he turned his wagon out of the west bound track the car was one hundred feet away and that in order to get entirely out of the track it was necessary for the wagon to travel a distance of about six feet. The statements of this witness are conflicting and contradictory in many particulars, which it is unnecessary for us to enumerate. It is undisputed that the car moved only two feet after the collision, indicating that it was traveling at a very slow rate when the accident occurred, as the impact was not sufficiently violent to delay the movement of the car.

On behalf of defendant eight witnesses testified, including the motorman and conductor, the other six being passengers upon the car. According to the testimony of these witnesses the coal wagon just prior to the accident was traveling entirely in the south track, being the track used by east bound cars, so that the collision between the car and the rear part of the wagon must have been due to the fact that the rear wheels of the wagon in some unexplained manner slipped out of the track and the rear part of the wagon slid or moved in a northerly direction for a sufficient distance to bring it in contact with the car. There is undisputed testimony to the effect that the only damage to the car was the breaking of the glass in an outside or storm window. The glass of the inner window was cracked

going west on Sixth avenue with a load of coal. Then by the
kindness of the interviewer of this account we saw Miss
he was on the north bank, taken the canal down by West Bend
here, and was pulling his wagon out from out of the water,
when the front part of the wagon was practically out of the
canal itself, the rear end of the wagon bottom - hitch and the
rear hanged into the water. In further inquiries we found the
motorman first reached the hole around 5:30 p.m. on the
morning 5th, the car was not moving and sitting full over the
at the time when he learned that water was in the car
the car was one inserted fact away and that in order to get
materially out of the water it was necessary for the wagon to
travel a distance of about six feet. The circumstances of this
case are conflicting and contradictory in many particulars, which
it is unnecessary for us to enumerate. It is undisputed that the
car moved only two feet after the collision, indicating that it
was travelling at a very slow rate when the collision occurred, or
the brakes was not sufficiently tighten to delay the movement of
the car.

On behalf of defendant claim reasonable diligence,
including the patrolmen and trainmen, the motor car being
inadequately upon the car. According to the testimony of these
witnesses the coal wagon just prior to the collision was moving
relatively in the south track. While the track was by that time
wet, so that the collision happened the car not the coal wagon
of the wagon must have been due to the fact that the front wheels
and the rear part of the wagon did not move in a manner
providing for a collision driver to bring it to the correct side
the car. There is substantial evidence to the effect that the
wagon driver in the car was the driving of the track in a man-

only, but was not shattered. Plaintiff's testimony as already shown does not indicate that any part of her body came into violent contact with any portion of the car. Three of the passengers testified to the effect that plaintiff was not struck by anything in the car; that she did not fall off her seat; that there was not much of a "bump" or any kind of a shake and that plaintiff did not lose consciousness at the time.

It was held in a case involving facts and conditions similar to those stated by these witnesses, where there was a collision between a street car and a coal wagon, both traveling in the same direction, due to the fact that the rear end of the wagon had slued around, coming into contact with the car, that the evidence showed no negligence on the part of defendant. No defect in the machinery, cars or tracks was alleged or proven. The car in which the passenger was riding did not leave the track. The passing of the car along one track and the passage of the wagon along the other parallel track was not negligence and is not dangerous. This condition arises many times during each day in the City of Chicago without accident or injury to anyone. No presumption of negligence in the operation of the car arises in such cases. Lochner v. North Chicago Street Ry. Co., 116 Ill. App., 365. There is no evidence tending to support the theory that the motorman was not warranted, in the exercise of due care, in believing that it was safe for him to proceed on his way slowly and carefully, as he seems to have done according to the undisputed evidence in the case. Griswold v. Chicago City Rys. Co., 150 Ill. App., 614; Chicago City Rys. Co. v. Hood, 163 Ill., 477. The testimony of defendant's witnesses upon every material fact or circumstance connected with the accident is uncontradicted except in so far as the testimony of the driver of the wagon can be regarded as a partial contradiction thereof in some minor particulars. Under such cir-

[illegible] Dissolution's [illegible] is already [illegible] [illegible] [illegible]

cumstances we cannot avoid the conclusion that the verdict and judgment of the trial court were contrary to the manifest weight of the evidence and that the judgment should therefore be reversed. Segal v. Chicago City Rys. Co., 216 Ill. App., 11.

Furthermore, it is shown by the undisputed evidence of at least five disinterested witnesses that plaintiff was not physically injured and did not come into violent contact with any part of the car or the vehicle as alleged in her declaration. The most that can be said to have happened to her was that she became hysterical and exhibited fright or terror. This was unaccompanied by any contemporaneous physical injury and cannot be the basis of any recovery. Braun v. Craven, 175 Ill., 401.

The judgment of the Circuit Court is reversed with a finding of facts.

REVERSED WITH FINDING OF FACTS.

Gridley, P. J., and Barnes, J., Concur.

[illegible] we cannot avoid the conclusion that the trivial and judgment of the trial court which resulting in the conviction rights of the criminal and that the judgment should therefore be reversed. Ramos v. Illinois, [illegible], 161 III. App. 2d.

Furthermore, it is obvious to the reasonable criminal of at least five disinterested witnesses that identity was not especially important and will not cause this minimal evidence with any part of the bad or the verdict, or alleged in her description. The most that can be said is that Defendant is but one that who fitness hypothetical and statistical trials or factual. This is not sufficient to any constitutional requirement lawfully and number in the hands of any criminal. Illinois v. Jackson, 177 III. App. 2d.

The judgment of the Circuit Court in [illegible] is Affirmed and Reversed.

AFFIRMED, WITH FINDING OF FACT.

Mahady, P. J., and Stamos, J., concur.

316 - 26490

FINDING OF FACTS.

We find as ultimate facts in this case that the defendant railway company was not guilty of the negligence charged in the declaration and that plaintiff was not injured in the manner set forth in the declaration.

336 - 26510

THE PETER SCHOENHOFEN BREWING COMPANY, a corporation, et al.,
Appellees,

vs.

NORTH AMERICAN BREWING COMPANY, a corporation,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

224 I.A. 641

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Superior Court of Cook County entered on May 13, 1920, finding defendant and Rudolph Lederer, its president, guilty of violating an injunction issued by said court on June 13, 1917, and imposing a fine of $500 upon each of them.

The original bill, filed May 29, 1917, shows that the complainants, nine in number, were on that date, and for many years prior thereto, engaged in the business of brewing and bottling beer and kindred products, in connection with which they owned and controlled large quantities of boxes, bottles and other equipment. Their business was extensive and lucrative. The bill alleged that complainants have expended large amounts of money in advertising the goods manufactured by them under their respective brands or trade-marks or under the corporate names used by them in connection with their business, so that the same have become well and favorably known to the consuming public; that the goods manufactured by them, for convenience in delivery, are put up in bottles and then placed in certain wooden boxes and that the beer contained in said bottles is sold at wholesale and retail to consumers; that in all cases the contents only of said bottles are sold and that complainants do not sell the said bottles and boxes; that the bottles used by complainants have their respective names blown on them, and in addition, words indicating that the

bottle is not sold and must be returned to and is the property of the complainant using it; that some of the bottles have trade-marks of the complainants as a further mark of identification and that the boxes or crates in which the beer-filled bottles are delivered to the customers have similar inscriptions branded upon them. The bill charges that defendant has obtained possession of a large number of these bottles and has been filling and using them and supplying its customers with beer manufactured by it in the bottles and boxes belonging to complainants, thereby deceiving and misleading the public and perpetrating a deception and fraud to the irreparable injury of complainants. The bill prays for an injunction restraining defendant from directly or indirectly buying, selling, trafficking in, filling, using or delivering or handling or having in its possession or under its control any of the boxes or bottles belonging to complainants which are branded or blown with the trade-marks or with the names of complainants or any of them and for general relief. The decree, entered June 13, 1917, recites that defendant has entered its appearance by its solicitors and consents in open court to the entry of the decree. It contains findings in conformity with the allegations of the bill and that the damage imposed upon complainants is of an irreparable character, requiring a large amount of time, expenditure of much money and a multiplicity of suits for each of them to bring individual complaints against defendant. The decree then orders as follows:

> "It is therefore ordered, adjudged and decreed that the defendant, North American Brewing Co., a corporation, its officers, agents, servants and employes and each of them, have no right to refill, handle or use any of the bottles or boxes belonging to the complainants or any or either of them, which are marked, engraved, or which have blown in on them the names or trade-marks of the complainants or any or either of them.
>
> "It is further ordered, adjudged and decreed that the defendant, the North American Brewing Company, its officers, agents and employes, be and they are herewith restrained from appropriating or in any way using, for the purpose of refilling, the beer bottles or beer bottle boxes, which have or bear any mark, sign, brand or stamp showing or tending to show such bottles or boxes to be the property of any of the complainants herein."

Sundry petitions, with amendments, charging defendant and Rudolph Lederer, its president, with the violation of this injunction were filed, which defendant answered, specifically denying the charges. The case was referred to a master in chancery, upon the issues raised by these pleadings, who found by his original and supplemental reports that defendant and said Rudolph Lederer had been guilty of violating the injunction order and recommended that an order be entered finding them in contempt of court for violating the decree of June 13, 1917, and that they be punished accordingly. Objections were filed and overruled by the master. These reports were approved by the court. The evidence shows that the findings of the master as to the violation of the injunction are fully sustained. We are satisfied that the chancellor who heard the matter was justified in entering his order of May 13, 1930, finding defendant and said Lederer guilty of contempt of court and imposing the fines therein mentioned.

It is urged by appellants that as a result of federal prohibition legislation the basis of the injunction and its subject-matter were destroyed and that when the right to manufacture and sell beer no longer existed, the injunction awarded in this case necessarily terminated. We do not regard this contention as meritorious. The language of the injunction order is sufficiently broad to prevent the use by defendant of the bottles in question for refilling purposes. It is not denied that defendant used the bottles in question as receptacles for beer and the mere fact that the beer sold by defendant in these bottles was not of the same grade or quality as the original contents of the bottles does not justify the use of the bottles by defendant. The word "beer" is a comprehensive term. It is not necessarily an intoxicating liquor. It may be made from various substances. A great variety of liquid substances may be designated as beer, although they are not intoxicating. United States v. Standard Brewery, 251 U. S., 210. The

Sundry petitions, with supplements, charging defendant and Randolph Liebner, its president, with the violation of the injunction were filed, which defendant answered, specifically denying the charges. The case was referred to a master in chancery, upon the issues raised by these pleadings, who found by his original and supplemental reports that defendant and said Randolph Liebner had been guilty of violating the injunction order and recommended that an order be entered finding them in contempt of court for violating the decree of June 18, 1927, and that they be punished accordingly. Objections were filed and overruled by the master. These reports were approved by the court. The evidence shows that the findings of the master as to the violation of the injunction are fully sustained. We are satisfied that the Chancellor who heard the matter was justified in entering his order of May 11, 1930, finding defendant and said Liebner guilty of contempt of court and imposing the fines therein provided.

It is urged by appellants that as a result of Federal prohibition legislation the basis of the injunction and the subject-matter were destroyed in that when the right to manufacture and sell beer no longer existed, the injunction decree in this case necessarily terminated. We do not regard this contention as meritorious. The language of the injunction decree is unmistakably meant to prevent the use by defendant of the bottles in question for refilling purposes. It is not denied that defendant used the bottles in question as receptacles for near beer of the same type as that beer sold by defendant in large bottles and of the same grade or quality as the original contents of the bottles, thus justifying the use of the bottles by defendant. The word "beer" is a comprehensive term. It is not restricted to intoxicating liquors. It may be made from similar materials. A great variety of liquid refreshments may be designated as beer, although they are not intoxicating. United States v. Standard Brewery, 251 U. S. 210; the

same view as to the meaning of the word "beer" has been adopted by our Supreme Court in the case of Hansberg v. The People, 130 Ill., 21. The order of June 13, 1917, was explicit in its terms and restrained defendant and its officers and agents, including its president, from using the bottles in any way for the purpose of refilling. This order should have been obeyed, unless modified or vacated. The order was entered by the Superior Court in the exercise of its jurisdiction and that court has the power to enforce its order as a necessary incident to the administration of justice. Court Hose F. of A. v. Corna, 279 Ill., 609. The mere fact that as a result of prohibition legislation some change in the character and quality of beer manufactured and sold has been rendered necessary, is no defense to this proceeding.

The order of the Superior Court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

22020

360 - 26534

ADAM GRANBERRY,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY and CHICAGO CITY RAILWAY COMPANY, Corporations, (which with the Calumet and South Chicago Railway Company and the Southern Street Railway Company are doing business under the name and style of Chicago Surface Lines),
Appellants.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

224 I.A. 641

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

Appellants seek the reversal of a judgment against them for $2500 entered by the Superior court of Cook County April 23, 1920, in an action to recover damages for injuries sustained by plaintiff as the result of a collision between one of appellants' cars and a wagon in which plaintiff was driving on Franklin street between Erie and Ontario streets in the city of Chicago on January 8, 1919. Reversal is sought upon the ground that the verdict of the jury was not justified by the evidence, being contrary to the manifest weight thereof. No complaint is made as to the rulings of the trial court upon questions of evidence or in giving or refusing instructions or that the damages are excessive.

The declaration contains two counts, in the first of which it is charged that defendants carelessly and negligently operated one of its cars at the time and place above stated so that it collided with plaintiff's wagon, causing plaintiff to be thrown therefrom, whereby he sustained serious injuries, for which he demands damages. The second count was withdrawn before the case was submitted to the jury.

The car in question was being propelled in a northerly

[illegible]

[illegible]

[illegible]

direction over the east track on Franklin street. There are two tracks on this street, the west being used by southbound cars and the east by northbound cars. The accident occurred near the intersection of Franklin and Erie streets. There is also a double track street railway on Erie street, the north track of which is used by westbound cars and the south track by eastbound cars. Eastbound cars on Erie street are run to Franklin street and then turn southerly on Franklin street, proceeding south on the west track on that street. Before taking the curve they stop on the west side of Franklin street to receive and discharge passengers. At the time of the accident plaintiff was driving a one horse express wagon with a movable seat, on which he was sitting. Just before the collision he had driven in an easterly direction along an alley which crosses Franklin street at a right angle between Erie and Ontario streets.

Plaintiff testified that when he emerged from the alley and before passing the west curb of Franklin street, on which he intended to drive in a northerly direction, he brought his team to a standstill and looked up and down Franklin street in both directions; that while he was making these observations a car turned from Erie street and proceeded past him in a southerly direction on Franklin street; and that this car was followed by another car proceeding southward, which came to a stop on Franklin street after turning from Erie street. The plaintiff stated that the motorman on this car motioned to plaintiff to proceed across the west track on Franklin street. The car was then approximately one hundred feet north of the intersection of Franklin street and the alley. At that time plaintiff says that he saw a northbound car on Franklin street, which had stopped at the south cross-walk of Ontario street, which is one hundred seventy-five or more feet from where the wagon was

standing, according to measurements shown in the record. Plaintiff then turned out of the alley, crossing Franklin street in a northeasterly direction for twenty or thirty feet until he came to the east track. He says that he proceeded in a northerly direction on the east track some sixty feet until the rear end of his wagon was struck by the northbound car. The impact was sufficiently violent to force the wagon forward and to cause plaintiff to fall from his seat backward into the body of the wagon. Thereafter the northbound car again struck the wagon and pushed it against the southbound car standing on Franklin street. Plaintiff was thrown to the ground and sustained the injuries of which he complains. His testimony as to these details was corroborated more or less by five other witnesses who were either bystanders or passengers on the northbound car. Plaintiff does not claim to have seen the northbound car from the time it left the south side of Ontario street until just after it struck his wagon and does not testify as to the speed at which the car was traveling.

The testimony of defendant's witnesses tends to show that plaintiff drove his team out of the alley at a rapid pace. It is said that the horse was trotting and that plaintiff narrowly escaped a collision with the southbound car above mentioned; that he so escaped was due solely to the efficiency of the motorman, who succeeded in stopping his car within fifteen feet and thereby avoided such an accident. Appellants contend that plaintiff drove his horse at a trot across the west track in Franklin street and directly in front of the northbound car, so that it was impossible for the motorman to avoid the collision. The motorman on the northbound car testified that when he was on the south cross-walk of Ontario street he saw the horse and wagon coming out of the alley and that as his car proceeded north on Franklin street he

sounded the gong. The horse was trotting. The team turned northeast. The motorman rang the bell to signal plaintiff to get out of the way of the car. Plaintiff continued his course and the car struck the center of the wagon.

From this conflicting testimony, which has been reviewed briefly, we think that the jury were actuated in reaching their verdict by the belief that the motorman saw the horse and wagon going northeasterly on Franklin street when he was more than half a block distant therefrom and could have avoided the accident by the exercise of ordinary care. It is probable that the jury believed that the motorman on the northbound car could have stopped his car within fifteen or twenty feet and thus avoided the collision in the same way that defendants' witnesses say the southbound car was stopped by its motorman.

We think that such a view of the evidence was not wholly unwarranted and that the record contains ample evidence to sustain the verdict of the jury. The collision doubtless could have been avoided if the motorman on the northbound car had used the same degree of care and caution that was said to have been displayed by the motorman on the southbound car. The judgment was not manifestly against the weight of the evidence. Chambers v. S. C. Ry. Co., 189 Ill. App. 68; Chicago City Ry. Co. v. Gemmill, 209 Ill. 638.

The judgment of the Superior court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

[illegible] the jury. The error was harmless. The [illegible] [illegible]-
tant. The substance may [illegible] to [illegible] plaintiff is not
and at the time of the [illegible]. Plaintiff contended the jury and
the [illegible] should [illegible] if the [illegible].

From this conflicting testimony, which has been re-
viewed briefly, we state that the jury was warranted in [illegible]
their verdict by the belief that the [illegible] [illegible] [illegible]
[illegible] particularly on [illegible] [illegible] by [illegible]
[illegible] a [illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] by the [illegible] of [illegible] [illegible]. It is [illegible] that
the jury believed, that the [illegible] on the [illegible] [illegible] [illegible]
have [illegible] his [illegible] [illegible] or [illegible], [illegible] [illegible]
[illegible] the [illegible] in the [illegible] [illegible] [illegible]
[illegible] the [illegible] [illegible] [illegible] by the [illegible].

We think that [illegible] if the [illegible] [illegible]
[illegible] [illegible] and that the [illegible] [illegible] [illegible]
[illegible] the [illegible] of the [illegible]. The [illegible] [illegible]
[illegible] have been [illegible] if the [illegible] [illegible] [illegible]
but some [illegible] [illegible] of [illegible] [illegible] [illegible] [illegible] [illegible]
have been [illegible] by the [illegible] on the [illegible]. The
[illegible] was not [illegible] [illegible] the [illegible] of the [illegible].
[illegible] v. [illegible], [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
v. [illegible], [illegible] [illegible].

The judgment of the [illegible] [illegible] be [illegible].

[illegible]

[illegible], J., [illegible] [illegible] [illegible].

391 - 26565

MORRIS SHAPIRO,
Appellee,

vs.

CHARLES WEISS and I. WEISS,
individually and as copartners
doing business as WEISS
HUNGARIAN RESTAURANT and
ALEX WEISS & CO.,
Incorporated,
Appellants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

224 I.A. 641

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

Action was brought to recover the value of an overcoat belonging to plaintiff which was lost or stolen in defendants' restaurant. The amended statement of claim set forth that plaintiff on or about March 15, 1920, while eating at defendants's restaurant lost an overcoat for which he had paid $75; that he made demand on defendant, who failed to produce the coat or pay him the value thereof. The case was tried before the court without a jury. There was a finding and judgment in favor of plaintiff for the sum of $75 and costs. No brief has been filed on behalf of the appellee.

The record shows that plaintiff on March 15, 1920, went to defendants' restaurant at 176 West Adams street, Chicago, where plaintiff had been accustomed to eat. He hung his hat and overcoat upon a clothes tree and sat down at one of the tables. When he was about to leave he found that his overcoat had disappeared. Plaintiff was sitting a few feet from the place where he had hung his coat and hat, which were at all times within the range of his vision and easily accessible by him. The following words were printed upon the menu card in use on that date: "Not responsible for wearing apparel." Plaintiff at no time gave his hat or coat into the custody of defendants or any of their employes. The court refused to hold as law a written proposition

submitted by defendant prior to the arguments in the case, which was to the effect that a patron of a restaurant who hands his hat and overcoat upon a clothes tree in a restaurant provided for that purpose does not thereby create between himself and the owner the relationship of bailor and bailee. We think that the court erred in refusing to hold this proposition and misapprehended the law applicable to the case.

A restaurant keeper is not liable for the loss of an overcoat belonging to a customer where the evidence shows that the customer hung the overcoat on a clothes tree furnished for that purpose without availing himself of the services of the restaurant keeper or his employes in taking care of the garment, even though the customer testifies that he had not read the notice on the menu card disclaiming responsibility for wearing apparel. Wiley v. Childs Company, 211 Ill. App., 496.

The judgment of the Municipal Court is reversed.

REVERSED.

Gridley, P. J., and Barnes, J., concur.

22044

409 - 26583

BARNEY OLSHANSKY, Appellee,

vs.

M. ESPERT, Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

224 I.A. 641

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action of replevin in the Municipal Court of Chicago March 11, 1920, to recover certain goods and chattels consisting of timber, scrap iron and saloon furniture of which he claimed to be the owner and which he alleged had been wrongfully taken and detained by defendant. The case was tried without a jury. There was a finding and judgment in favor of plaintiff awarding him possession of the property and nominal damages. A reversal is sought upon the ground that plaintiff failed to prove his ownership of the goods and upon the further ground that there was no demand upon defendant for the property or refusal by him to deliver the same, as is necessary in a case where the defendant is in lawful possession of the goods. No brief was filed by appellee.

The goods in question were located in a building which is described as the West Side Brewing plant. This plant was purchased by defendant, who received a conveyance of the property and its contents March 2, 1920. The conveyance was accompanied by a list of articles excepted from the purchase, which did not include any of the items mentioned in the replevin writ. By virtue of this transaction defendant was lawfully in possession of the property in question. Therefore plaintiff should have demanded possession of the goods and chattels from defendant before commencing this action. The law is well settled that where a party obtains possession of property lawfully, an action of replevin cannot be maintained to recover it until a demand

has been made and possession refused. O. & M. Ry. Co. v. Moe, 77 Ill. 513; Rosenbaum v. Gest, 114 Ill. App. 648. No such demand or refusal is shown in the present case. Consequently plaintiff cannot recover.

Plaintiff claimed that he purchased a part of the goods and chattels from the National Brewing Company and the remainder from the Seipp Brewing Company. This contention is not sustained by the evidence. It was material for plaintiff to show that he was the owner of the property in question. He must recover upon the strength of his own title. The burden of proof was upon him to show a general or special property in the goods themselves. Perkins v. Knieseley, 204 Ill. 275; Hacker v. Munroe, 56 Ill. App. 532. The failure to prove this material fact prevents a recovery on the part of plaintiff.

The judgment of the Municipal Court is reversed and the case remanded with directions to order a return of the property to defendant.

REVERSED AND REMANDED.

Gridley, P. J., and Barnes, J., concur.

Bad debt notes and promissory notes. E.g. [illegible], 7- [illegible]
77 [illegible], [illegible]; [illegible] v. [illegible], 114 [illegible], [illegible]. In such
cases as follows is shown in the previous note. Contractual
liability cannot remedy.

Liability cannot also be determined (part of the whole
and obtain from the national credit company and the insurance
from the Swing Accounting Company. This information is not contained
by the exhibitors. It was material for plaintiff to show that he
was the owner of the property in question. It was therefore plain
the ownership of his own claim. The burden of proof not upon him
to show a property in equitable ownership in the other insurance.
[illegible] v. [illegible], 204 [illegible], [illegible]; [illegible] v. [illegible], 24 [illegible], [illegible]
[illegible]. The failure to prove that material fact prevents a re-
covery on the part of plaintiff.

The judgment of the [illegible] Court is reversed and
the case remanded with directions to enter a judgment of the
recovery in defendant.

REFERENCES AND CITATIONS.

[illegible], 7, [illegible] and [illegible], 2, [illegible].

431 - 26605

NELLIE HAVERN and MAGGIE HAVERN, Appellees, vs. NATIONAL COUNCIL OF THE KNIGHTS AND LADIES OF SECURITY, Appellant.	APPEAL FROM COUNTY COURT, COOK COUNTY.

224 I.A. 642

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment in favor of appellees as beneficiaries under a certain benefit certificate issued by appellant to William Houlihan, since deceased, who was a brother of the appellees. The amount of the certificate was $1,000. It was issued January 2, 1912. William Houlihan died September 21, 1914. The declaration sets forth the issuance and terms of the certificate and alleges compliance with the terms of the contract by the member and his beneficiaries. The pleas which are relied upon alleged that the application of the insured for membership in the society contained two false statements which were warranties and were to the effect that the applicant had only one dead brother and no dead sister. It is admitted that the application contained these two statements and that they were false. They are contradicted by statements contained in the proofs of death furnished by the beneficiaries. The facts were that at the time of making his application the applicant had two dead brothers and one dead sister.

The case was formerly before this court and the former judgment, which was also in favor of appellees, was reversed and the case remanded on account of errors of the trial judge in rulings upon questions of evidence. Havern v. National Council, 209 Ill. App. 182.

The evidence shows that the deceased member made his

[illegible]

[illegible]

[illegible]

application upon the suggestion of Mrs. Mary Thornton, who was also a member of the defendant society and presumably interested in its welfare, if not its active agent and propagandist. While William Houlihan, the applicant, was engaged in repairing a stove at Mrs. Thornton's residence, Dr. Boland, who was the medical examiner of the defendant society, called to visit in a professional capacity one of Mrs. Thornton's children who was then ill. Mrs. Thornton testified that when he came to visit her little girl she said to him, "Doctor, we have another member for the Knights and Ladies of Security." The doctor then proceeded to make out the application for membership and inquired as to the applicant's family history. In response to his request for information upon that subject Houlihan said, "Mrs. Thornton knows more about the family than I do." Mrs. Thornton testified that she then proceeded to give the doctor the history of the Houlihan family and stated to him explicitly that the applicant had two dead brothers, James and Daniel, and one dead sister, whose name was Catherine Hennessy, and that while she was giving this information Houlihan had left the room. This testimony is not disputed by Dr. Boland, who says that the statements which he embodied in the application as to the family history were furnished him by either Mrs. Thornton or William Houlihan and that he wrote them down "just as given to me by them." It follows that the testimony of these two witnesses can be reconciled only under the theory that Mrs. Thornton's testimony was incorrect or that the medical examiner did not transcribe correctly the information that was given him in response to his inquiries. The jury heard the testimony of these witnesses and apparently adopted the evidence given by Mrs. Thornton as a true statement of what transpired at the time of making the application. This view of the case is not contrary to the manifest weight of the evidence.

The medical examiner was the agent of defendant society and if he transcribed incorrectly the answers to the questions which he propounded, as the jury has found, defendant thereby waived its right to object to the verdict upon the ground that the answers of the deceased were warranties. Weisguth v. Supreme Tribe of Ben Hur, 272 Ill., 541; Johnson v. Royal Neighbors, 253 id. 570. Notice to the agent at the time of the application of facts material to the risk was notice to the society and prevents it from insisting upon a forfeiture for causes within such agent's knowledge. The insurer cannot insist that statements in the application are warranties, the falsity of which forfeits the policy, when these statements are conclusions of the agent which he has inserted in the application in lieu of facts disclosed to him on behalf of the applicant. Provident Life Society v. Cannon, 201 Ill. 260; Royal Neighbors v. Bowman, 177 Ill. 27.

It is also urged on behalf of appellant that the trial court should have granted a new trial on the ground of newly discovered evidence. We think that the ruling of the trial court upon this subject was correct. It does not appear that the alleged newly discovered evidence was of such a character as would have justified the granting of a new trial. Graham v. Hagmann, 270 Ill. 252. We find no reversible error in the rulings of the court upon questions of evidence or in allowing plaintiff to amend its replications prior to the judgment correcting a mere clerical error therein.

The judgment of the County Court is affirmed.

AFFIRMED.

Bridley, P. J., and Barnes, J., concur.

454 - 26628

BERNARD W. DAMMERS and
CORNELIA M. H. DAMMERS,
Appellees,

vs.

GEORGE W. GOLDSTINE,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

224 I.A. 642

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

Appellees brought an action of forcible entry and detainer in the Municipal Court of Chicago against the appellant to obtain possession of an apartment on the first floor of the building known as No. 3412 West Adams street, Chicago. The case was heard by the court without a jury and judgment entered in favor of the appellees.

Appellant was in possession of the apartment under a lease for two years, which was executed by an agent of the former owner of the property. The lease was in the form usually employed in such cases. By its terms it expired April 30, 1920, provided sixty days written notice was given by either party of his intention to terminate on that date; otherwise the lease continued from year to year until terminated by such notice. On the back of the lease there was an additional memorandum in the following words: "The party of the second part has the option of two additional years at same rental, also with one month's concession, for the same period." It was stipulated by the parties that this endorsement was on the lease at the time it was executed and before delivery. On or about February 6, 1920, the lessee gave to the lessor notice of his intention to exercise the option specified in the memorandum.

Plaintiffs in the Municipal Court contended that they were entitled to the possession of the premises upon the

theory that appellant was holding over after the expiration of his lease and that the memorandum on the reverse side of the lease was void under the statute of frauds. The defendant claims that the lease did not by its terms expire April 30, 1920, for the reason that it contained the option giving him the right to remain in possession for two additional years, which was exercised by him, and that he therefore was entitled to remain in possession until April 30, 1922.

The great weight of authority sustains the view that the memorandum endorsed upon the lease was a part of the lease and binding upon the parties thereto. Any memorandum either upon the margin or reverse side of a contract, which was made by agreement of the parties contemporaneously with the execution of the instrument, must be treated as forming a part of the contract, the same as if it was in the body of the instrument. Croft v. Beecher, 185 Ill. App. 622; Van Zant v. Hopkins, 151 Ill. 248. This rule applies to any form of contract. Heldman v. Gunnell, 201 Ill. App. 172. We think the trial court was right in holding that the endorsement upon the lease formed a part of the instrument in question and was binding upon the parties to the lease.

While not admitting that the court was correct in its construction of the memorandum above indicated, appellees now contend that the entire lease was void under the statute of frauds for the reason that it was executed by an agent without written authority. For the purpose of proving that plaintiffs were entitled to the possession of the demised premises, they offered the lease in evidence and insisted that defendant was holding over after the expiration of its terms. They are therefore in the position of basing their claim for relief upon the terms of the instrument itself and at the same time denying the validity of the instrument under the statute of frauds. Appellees rely

theory that appellant was holding over after the expiration of 1922 lease, and that the memorandum on the reverse side of the lease was void under the statute of frauds. The defendant contends that the lease did not by its terms expire April 30, 1922, for the reason that it contained the option giving him the right to remain in possession for one additional year, which was exercised by him, and that he therefore was entitled to remain in possession until April 30, 1923.

The great weight of authority sustains the view that the memorandum endorsed upon the lease was a part of the lease and binding upon the parties thereto. Any memorandum written upon the margin or reverse side of a contract, which was made by agreement of the parties contemporaneously with the execution of the instrument, must be treated as forming a part of the contract, the same as if it was in the body of the instrument. [illegible] v. [illegible], 105 Ill. App. 254; [illegible] v. [illegible], 172 Ill. 345. This rule applies to any form of contract. [illegible] v. [illegible], 222 Ill. App. 286. We think the trial court was right in holding that the endorsement upon the lease formed a part of the instrument in question and was binding upon the parties to the lease.

While not admitting that the option was exercised in the contemplation of the memorandum these plaintiffs, appellees now contend that the entire lease was void under the statute of frauds for the reason that it was executed by an agent without written authority. For the purpose of proving that plaintiffs were entitled to the possession of the leased premises, they offered the lease in evidence and insisted that defendant was holding over after the expiration of its terms. They are therefore in the position of basing their claim for relief upon the terms of the instrument itself and at the same time assailing the validity of the instrument under the statute of frauds. Appellees only

upon the case of Northwestern University v. Hughes, 183 Ill. App. 236. In that case the defendant was in possession of certain demised premises and claimed the protection of a lease which had been executed by an agent of the lessor, who had no written authority for that purpose. The court then held that the lease was voidable under the express terms of the statute of frauds and that the defendant having entered into possession and paid rent monthly under a lease which was voidable under the statute, became a tenant from month to month and was entitled to a thirty day notice to determine the relationship. Such a notice was given and the plaintiff thereupon became entitled to possession, the court holding that the acceptance of rent from the tenant amounted to nothing more than a partial performance of an invalid contract. Plaintiff in the case at bar did not pursue this course, but preferred to rely upon the terms of the lease for the purpose of showing that the tenant was holding over after the expiration of the term. He cannot be permitted to rely upon the lease and in the same case to repudiate its terms. If it had been the intention of plaintiffs to rely upon the invalidity of the lease under the statute of frauds, they should have treated appellant as a tenant from month to month and served a thirty day notice to terminate the tenancy as was done in the case of Northwestern University v. Hughes, supra. Instead of doing so they brought a suit based upon the lease. Plaintiffs were estopped from setting up the statute of frauds by their acts in recognition of their contract and by their election to base their claims for relief upon the contract itself. Curtis v. Hulburd, 46 Ill. App. 419. In the last cited case, the court said, "The Statute of Frauds is not a sword but a shield." Manifestly, it cannot be both sword and shield in the same case. Plaintiffs adopted the unauthorized lease for one purpose and must be held to have adopted it in its entirety. A ratification of an agreement concluded by an agent cannot

be limited to a part of the agreement. The acceptance of a part is constructively an acceptance of the whole. Morris v. Tilson, 81 Ill. 607; Union Mutual Life Ins. Co. v. Kirchoff, 133 Ill. 368. The endorsement upon the lease formed a part of the document itself and, the lessee having exercised the privilege given him thereby, the term of the lease was extended to April 30, 1922.

The judgment of the Municipal Court is reversed.

REVERSED.

Gridley, P. J., and Barnes, J., concur.

106 - 27052

OWEN O'BRIEN,
Plaintiff in Error,

vs.

CHICAGO CITY RAILWAY COMPANY
and CHICAGO RAILWAYS COMPANY,
Defendants in Error.

ERROR TO SUPERIOR COURT
OF COOK COUNTY.

224 I.A. 642

PER CURIAM.

This writ of error is prosecuted from a judgment of the Superior court of Cook County, which was rendered solely upon the pleadings. This cause was before this court upon two prior occasions and before the Supreme court upon one occasion. The decisions upon these prior occasions, and the order in which they were rendered, will be found in 216 Ill. App., 115; 293 Ill. 140 and 230 Ill. App. 107, and they give a sufficient history of the case.

After the cause was remanded to the Superior court, and was redocketed in that court, plaintiff in error filed four additional counts. The first and second of these counts are copies of the original counts except that they contain the additional allegation that plaintiff's work was extra hazardous, thus showing that plaintiff and his employer were bound by the Workmen's Compensation Act. Defendants filed a demurrer to these two additional counts. The third and fourth additional counts are likewise copies of the original counts except they contain the additional allegations that plaintiff's work was extra hazardous, and that his injuries were not proximately caused by the negligence of his employer or its employee. Defendants filed the general issue and a plea of the statute of limitations to these latter counts, and plaintiff demurred to this latter plea. Upon the hearing of the cause the court sustained defendants' demurrer to the first and second additional counts, and overruled plaintiff's demurrer to defendants

plea of the statute of limitations to the third and fourth additional counts; and plaintiff elected to stand by his first and second additional counts and to stand by his demurrer to the plea of limitations to the third and fourth additional counts. He afterwards dismissed his original counts and thereupon the court entered judgment against plaintiff and in favor of defendants for costs of suit. To reverse this judgment this writ of error is prosecuted.

The question presented as to the sufficiency of the first and second additional counts is whether an allegation that plaintiff's injuries were not proximately caused by the negligence of his employer or its employes is necessary to the statement of the cause of action attempted to be stated in these counts.

When this cause was before this court upon the first occasion, both parties and this court assumed that it appeared that plaintiff and his employer were bound by the Act; and we held that in such cases section 6 took away the employe's common law or statutory right of action against a third party employer, who had elected not to be bound by the Act except as such right of action was saved by section 29, and that it was saved by section 29 upon the condition, among others, that the injury was not proximately caused by the negligence of the employer or its employes; and we held that as the original counts contained no such allegation they did not state a cause of action.

It will be noted that the only change between the first and second additional counts and the original counts is that the former expressly show what was assumed on the former hearing, namely, that plaintiff and his employer were bound by the Act; and if we were right in our former holding it necessarily follows that the trial court did not err in sustaining the demurrer to the first and second additional counts.

Since these prior decisions were rendered the Supreme Court in Goldsmith v. Payne, 300 Ill. p. 119, said that the provisions of section 6

> "apply only to the right of the employee against his employer and have no reference to the liability of third persons causing injury to the employee."

But the Supreme Court subsequently in the case of Taylorville v. Ill. Pub. Serv. Co., 301 Ill. 157, said:

> "Section 6 prohibits an action by any employee within the provisions of the Act or anyone dependent upon him, or his legal representatives, to recover damages for an injury. This was held in Kegran v. Peoria, Bloomington & Champaign Traction Co., 277 Ill. 413, to prohibit such action against a third party, and this question was considered and the decision adhered to in Friebel v. Chicago City Railway Co., 280 Ill.76."

Defendants' main contention is that it is wholly immaterial to inquire which particular section of the act takes away the common law rights and remedies of an injured employe entitled to compensation, because it may properly be said that it is the act as a whole which abrogates the old system and substitutes an entirely new one in its stead. They cite the cases holding the Workmen's Compensation Act is a reasonable exercise of the police power by which one system of redress is substituted for and made to supersede the old system of redress by common law action. (N. Y. C. R. R. Co. v. White, 243 U. S. 188; Middleton v. T. P. & L. Co., 249 U. S. 152, 163; M. & M. Zinc Co. v. Ind. Bd., 284 Ill. 378, 383; Johnson v. Cheats, 284 Ill. 214, 219; Grand Trunk W. Ry. Co. v. Ind. Com., 291 Ill. 167, 174, 177; McNaught v. Hines, 300 Ill. 167, 172; Ill. Pub. Co. v. Ind. Com., 309 Ill., 189; Purcell v. C. Rys. Co., 221 Ill. App. 343, 345; Shanahan v. Monarch Eng. Co., 219 N. Y. 169, 114 N. E. 795). They contend that as one system is a substitute for the other, it was never intended that an injured employe should be permitted to enjoy both cumulatively. (Kegran v. P. B. & C. Tr. Co., 277 Ill.,413, 423; Friebel v. C. C. Ry. Co., 280 Ill., 76, 88; Gonas v. Fisher, 286 Ill. 606, 611, 613; Bishop, Adm. v. S. Rys.Co.,

215 Ill. App. 153, certiorari denied; 28 N. C. L. 334. 121; notes, L. R. A. 1916 A. pp. 100-101, L. R. A. 1917 F 1044).

Plaintiff argues that the Goldsmith case is directly contrary to the line of reasoning of our former opinions in this case, and that if section 6 does not take away the right of action nothing can be found in section 29 which does so. Defendants contend that even if the Goldsmith case is based on a different line of reasoning, the court meant to hold that the only suits which can be maintained by injured employes entitled to compensation against third persons are those provided for by section 29, because the act establishes a complete system covering the whole field, and because any other construction of the Goldsmith opinion would cause it to be in conflict with the settled view that the act is not intended to give double redress, but was only a substitute of one means of redress for another.

An examination of all the cases construing section 29 convinces us that the only possible question is as to the identification of that which takes away the common law rights of an injured employee entitled to compensation. That such common law rights are taken away by the act except as they are saved or re-conferred by section 29, we regard as settled. We therefore hold that the trial court did not err in sustaining the demurrer to the first and second additional counts, which concededly did not allege one of the conditions essential to a right of action under section 29.

In our second opinion in this case, 230 Ill. App. 107, we held that if plaintiff filed an amended declaration stating a cause of action under the Workmen's Compensation Act, defendants could properly plead the statute of limitations, which would be a bar unless the case came within some exception to the statute. We are still of this opinion, and therefore hold that the trial court did not err in over-

[illegible]

[illegible]

[illegible]

ruling plaintiff's demurrer to defendants' plea of limitations to the third and fourth additional counts.

The judgment is affirmed.

AFFIRMED.

114 - 26280

HARRY SCHUBERT, a Minor, by MARY SCHUBERT, his Mother and Next Friend, Appellee, vs. FRANK J. PATERA, Appellant.	APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

224 I.A. 642

MR. PRESIDING JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

The plaintiff, a boy ten years of age, on April 6, 1913, was injured by being struck by defendant's automobile while plaintiff was attempting to cross Ashland avenue, a north and south street, at a point about ten feet south of Grand avenue, an east and west street in the city of Chicago. A judgment was entered in favor of plaintiff upon the verdict of a jury for $3,500, which defendant seeks to reverse by his appeal to this court.

Evidence introduced on the trial tends to prove that plaintiff, a newsboy, and other boys, just before the accident occurred were at the southeast corner of the streets named waiting for the arrival of a newspaper wagon. While so waiting the boys engaged in play about the corner of the streets. Plaintiff being chased by one of the boys ran in a southwesterly direction across Ashland avenue, starting from a point about 10 feet from the southeast corner of the streets. Two street car tracks are laid down in Ashland avenue and likewise two tracks extend along Grand avenue. The accident occurred about three o'clock in the afternoon. As the plaintiff ran into the street and at a point near the center of the east or north bound track on Ashland avenue, he collided with defendant's automobile, which was being driven by defendant's chauffeur.

For the defendant it is urged that his car had come to standstill just before the accident.

Eliza Carr, a witness for plaintiff, testified that she was standing on the east side of Ashland avenue and south of Grand avenue; that she saw the plaintiff start to run across the street; that plaintiff was running as hard as he could; that she saw the automobile running north when it was from 50 to 100 feet away; that it was going very fast; that the automobile was about ten feet away from the crosswalk when it struck plaintiff and that it stopped immediately thereafter and then backed up.

James Corcoran, the boy who was chasing plaintiff just before the accident, testified that he saw the automobile strike plaintiff about 10 or 15 feet south of the crosswalk on the south side of Grand avenue; that plaintiff was struck in the northbound street car track on Ashland avenue and was thrown a foot or two. This witness, who was about eighteen years of age at the time of the trial, which took place about eight years after the accident, stated that the automobile was traveling just before the accident at the rate of about 25 miles an hour.

Mary Brown, a witness for plaintiff, testified that "the machine was 50 to 75 feet away at the time the boys started across the street," and "the machine was coming fast."

Defendant's driver testified that he saw the plaintiff running on the east sidewalk of Ashland avenue; that plaintiff had run a distance of about 65 feet on the east walk and that he then ran in a southwesterly direction across Ashland avenue, when he ran into the automobile; that just before the accident the automobile had been going 12 miles an hour and that plaintiff was running at the rate of 24 miles an hour; that at the time plaintiff left the sidewalk he, the witness, was 60 feet south of him; that he realized that if the boys "did not stop running" or the car did not stop there was liable to be a collision, and he said that he could have stopped his car within a distance

of 6 to 8 feet. In this connection the driver was asked the following question: "Now, you didn't stop when you saw the boys leave the sidewalk and run in a diagonal direction toward the car, did you?" He answered, "No, I didn't." He was further asked, "How far then did you proceed before you did stop?" He answered, "I went on and blew my horn." The witness further stated that he ran his car a distance of about 40 feet while the boy was running in a diagonal direction toward him, and when asked why he did not stop his car when he saw the boy leave the sidewalk and start in his direction, he answered, "I didn't see why I should stop it."

It may be conceded that the testimony of the boy, James Corcoran, with reference to the speed of the machine, in view of his age at the time of the accident, was of little value. The testimony of other witnesses who appear to be disinterested, that "the car was going very fast" and that "the machine was coming fast," together with the testimony of the driver himself and other testimony to the effect that the machine was 40 to 75 feet south of the plaintiff at the time he left the sidewalk, is evidence which we think the court properly submitted to the jury in support of plaintiff's contention that the driver of the car was guilty of negligence. Taking the testimony of the driver of the car as true, it appears that he ran his car 40 feet after he saw the running boys leave the sidewalk and at the time he could have stopped his car within a distance of about 6 to 8 feet. It is a fair inference from the testimony of this witness that he was mistaken as to the rate of speed at which his car was moving just before the accident, or that he was guilty of negligence in failing to stop the automobile within 6 to 8 feet from the time he saw the boys leave the sidewalk. His testimony in part at

least corroborates that of plaintiff's witnesses that the car was going at a high rate of speed just before the accident. Plaintiff was picked up after the accident happened while lying about 2 to 4 feet in front of the automobile, and he had not looked before leaving the east sidewalk to see whether cars were approaching or moving in his immediate vicinity on Ashland avenue.

There was evidence admitted on the trial sufficient to authorize the jury to find that defendant was guilty of negligence as alleged in the declaration. A count of the declaration charges that plaintiff's injuries were caused by the wanton and wilful negligence of defendant's driver. The evidence shows that plaintiff, a boy 10 years of age, was playing with other boys at a street intersection, where double street car tracks were laid in both streets. The accident, according to a preponderance of the evidence, happed within a few feet of the south crosswalk on Grand avenue. Under such circumstances the driver of the automobile was charged with knowledge of the fact that children of plaintiff's years will naturally engage in just such conduct as was indulged in by plaintiff when he attempted to cross Ashland avenue. Defendant's driver admitted that he saw the boy attempting to cross the street when he was 60 feet away from him, but notwithstanding this fact he says he made no attempt to stop the car until it was too late to prevent the accident which followed. Under such circumstances we are unable to say that defendant's driver was not guilty of wanton negligence.

In the case of Grugg v. Waldon Express Co., 291 Ill. 472, the driver of an automobile struck a boy who was heedlessly playing ball in a public street about in the middle of the block. There was a conflict in the evidence in that case, as here, with

reference to the speed of the automobile. In referring to the question of alleged contributory negligence on the part of the boy the Supreme Court said:

> "We shall not consider the question, because in our judgment, whether the ordinance prohibited the game or not and whether the defendant in error was guilty of contributory negligence or not, the evidence required the submission to the jury of the wanton negligence of the defendant. One count of the declaration charged that the defendant failed to stop its automobile when danger was imminent and carelessly, recklessly and wantonly ran it upon and against the plaintiff. If the facts shown by the evidence established the truth of this averment, the contributory negligence of the plaintiff would not relieve the defendant from liability for its wanton negligence. (Heidenreich v. Bremner, 260 Ill. 439; Illinois Central Railroad Co. v. Leiner, 202 id. 624; Wabash Railroad Co. v. Speer, 156 id. 244; Lake Shore & Michigan Southern Ry. Co. v. Bodemer, 139 id. 596.) Whether the negligent conduct of a defendant which has resulted in injury to another amounted to a wantonness is a question of fact to be determined by the jury, if there is any evidence in the record fairly tending to show such a gross want of care as indicates a wilful disregard of consequences or a willingness to inflict injury. Lake Shore & Michigan Southern Ry. Co. v. Bodemer, supra.) An intentional disregard of a known duty necessary to the safety of the person or property of another and an entire absence of care for the life, person or property of others, such as exhibits a conscious indifference to consequences, make a case of constructive or legal willfulness such as charges the person whose duty it was to exercise care with the consequences of a wilful injury. (1 Thompson on Negligence, secs. 20 22.)"

It is said that the court erred in its instructions to the jury. We have examined the instructions, and while instruction No. 2 could have been improved on, we do not think that it is so erroneous, or that in rulings on other instructions, such error was committed as warrants a reversal of the judgment.

The judgment is not in our opinion excessive. As a result of the accident plaintiff sustained a fracture of the leg which was followed by two or more operations thereon. He seems to have been confined to his bed for several months after the accident and had running sores on his leg, from which fragments of bone were discharged for several years following the injury. If the testimony touching the extent of plaintiff's injury is

true, then the verdict cannot be said to be excessive.

The judgment of the Circuit court is affirmed.

AFFIRMED.

Hatchett, J., Concurs.
McSurely, J., Dissents.

189 - 26362

MARGARET MILLER,
Appellee,

vs.

THOMAS D. SPENCER,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

224 I.A. 643

MR. PRESIDING JUSTICE DEVER
DELIVERED THE OPINION OF THE COURT.

The plaintiff brought suit in assumpsit in the Circuit court of Cook County, preceded by the levy of a distress warrant, for $340 rent due for farm premises, referred to in the brief of counsel as the "Miller Farm."

The defendant filed a plea of non-assumpsit and notice of a claim of set-off for damages, being in the main for an alleged ousting of defendant from the premises in question during a period of about seven months. The jury which tried the case returned a verdict in favor of plaintiff for $340 and also in favor of defendant for $75. The trial Judge deducted the amount of the verdict in favor of defendant from that for plaintiff and gave judgment in favor of plaintiff for the sum of $265. The defendant brings the case by appeal to this court.

The evidence shows that on March 1, 1912, plaintiff leased the premises in question to defendant for a term of three years ending March 1, 1915, at an annual rental of $680, payable in installments of $340 each, the first of which was to be paid on November 1, 1912, and the other installments on the first days of February and October of each year during the term. The lease contained a provision which permitted the plaintiff to terminate the tenancy on the first day of March, 1913, 1914 or 1915, in the event that she should sell the premises. This paragraph of the

lease contained a further provision that "After the 1st of September this lease is to stand good for the following year." The defendant occupied the farm until the expiration of the three year term. He paid no rent, however, for at least a part of the third or last year thereof.

There is sufficient evidence in the record to warrant a belief that defendant in order to escape liability for rent under the lease for the last year of the term had requested plaintiff to serve upon him a notice of the termination of his tenancy as of the end of the second year, and that following this request and the service of the notice plaintiff procured one Kamberg as a new tenant for the premises, the latter's tenancy to begin when defendant's ended. Kamberg in the early part of September, 1913, anticipating his tenancy, plowed about fifteen acres of this farm land and did other work thereon. Thereafter defendant objected to his presence on the farm and ordered him off the premises. Kamberg abandoned the farm and he appears to have brought, unsuccessfully, a forcible entry and detainer action against defendant. Defendant remained in full possession of the premises until the expiration of the three year term provided in the lease. As a result of defendant's determination to remain on the farm until the end of the term, the plaintiff was required to and did pay Kamberg $550 in settlement of claims made by him against her, and his lease of the premises was cancelled.

In the case of Alschuler v. Schiff, 164 Ill. 298, it was held that an agreement on the part of the tenant to abandon and on the part of the landlord to resume possession of demised premises amounts to a surrender by operation of law. There is nothing in the point that the lease to Kamberg was not effectively cancelled and abrogated. We do not think the evidence shows that

those mentioned a further provision that during the use of [illegible] for this lease it is agreed upon for the following year." The defendant occupied the farm until the expiration of the three year term. He paid no rent, however, for at least a part of the period as last year [illegible].

There is sufficient evidence in the record to warrant a belief that defendant in order to escape liability for rent under the lease for the third year of the term had requested plaintiff to serve upon him a notice of the termination of his tenancy as of the end of the second year, and that following this request and the service of the notice plaintiff procured one Cushing as a new tenant for the premises, the latter's tenancy to begin when defendant's ended. According to the early part of September, 1938, anticipating his tenancy, planted wheat [illegible] on this farm that had the other such tenants. Thereafter defendant appeared in the presence of the wheat and ordered him off the premises. Cushing abandoned the farm and in response to such eviction, subsequently, a [illegible] against defendant. Defendant remained in full possession of the premises until the expiration of the three year term provided in the lease. As a result of defendant's determination to remain on the farm until the end of the term, the plaintiff was required to and did pay Cushing $400 in settlement of claims made by him against her, and the lease of the premises was cancelled.

In the case of [illegible] v. [illegible], 282 Ill. 462, it was held that an agreement on the part of the tenant to abandon and on the part of the landlord to resume possession of demised premises amounts to a surrender by operation of law. There is nothing in the point that the lease to Cushing was not effectively executed and accepted. We do not think the evidence shows that

the defendant was in any appreciable way damaged by Kamberg's plowing of the fifteen acres of land and by his spreading manure thereon. The jury were justified in assuming that this work was an advantage and benefit to defendant.

Plaintiff alone seems to have sustained damage by reason of the making of the Kamberg lease, which the jury had some reason to believe was brought about by the conduct of defendant. Kamberg's presence on and use of part of the farm land was not prevented by the defendant. On the contrary he permitted the workman employed by Kamberg on the farm to board with him and he stabled horses employed in the work in his barn, for which board and service the defendant was paid by Kamberg. Notwithstanding that the evidence shows that Kamberg abandoned the farm some time in September, 1913, the defendant paid installments of rent due on October 1, 1913, and February 1, 1914, and he continued in possession of the farm until the expiration of the lease March 1, 1915. The evidence is not sufficient to show a total or even a partial eviction of defendant from the premises.

In the case of Leiferman v. Osten, 167 Ill. 93, the Supreme Court said:

> "The possession of the premises was retained by the tenant after the alleged acts of eviction. Possession retained after an alleged constructive eviction is a waiver of the right of abandonment. No constructive eviction exists without a surrender of possession."

The evidence does not show that the plaintiff had conveyed the premises so as to divest herself of the right to collect the rent due under the lease. The verdict in the case is somewhat informal, but we think the intent of the jury clearly appears therefrom. The jury found that plaintiff was indebted to defendant in the sum of $75 and that defendant was indebted to plaintiff in the sum of $340. The judgment for $265 expresses what appears to have been the finding of the jury as to the net

amount due plaintiff. Italian-Swiss Agricultural Colony v. Pease, 194 Ill., 98.

Other questions are presented by the brief of counsel for defendant, as to which it is our opinion no reversible error was committed by the trial court.

The judgment of the Circuit court is therefore affirmed.

AFFIRMED.

McBurely and Matchett, JJ., concur.

253 - 26406

EDWARD LE BAS, Trading as
EDWARD LE BAS & CO.,
Appellee,

vs.

SANDOVAL ZINC COMPANY,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

224 I.A. 643

MR. PRESIDING JUSTICE DEVER
DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment entered against it in the sum of $9955 in favor of the plaintiff in the Municipal court of Chicago.

February 24, 1915, defendant wrote plaintiff, then engaged in business in London, England, in answer to a letter of plaintiff's dated February 11, 1915, that defendant would sell

"Spelter at 40 for 100 English tons Spelter F. O. B. Baltimore, Philadelphia, New York or Baltimore, for 100 English tons for April delivery, you can cable us and deposit the money with a bank in Chicago, to be paid promptly on presentation of certificates of weights and railroad receipt. The Bank of Montreal or the Bank of Nova Scotia will be satisfactory; otherwise there is no use for further correspondence."

March 10, 1915, plaintiff in reply to this letter cabled defendant as follows:

"Will take hundred tons Virgin Spelter Forty Pounds English ton feb Philadelphia April shipment Bankers credit Chicago cable confirmation also percentage purity.

Following the receipt of this message defendant on March 15, 1915, sent the following cablegram to plaintiff:

"Your proposition tenth hundred English tons accepted Spelter not less ninety-eight percent zinc not over one-fifth per cent iron April shipment."

April 24, 1915, plaintiff cabled defendant as follows:

"Ship four twenty five ton lots Spelter against contract by Sandersons Steamer, New York Hull freight arranged cabling credit."

On the same day defendant in answer to the order contained in plaintiff's last telegram cabled plaintiff as follows:

> "Have no order from you for Spelter you did not accept our proposition March Fifteenth until today."

The evidence shows that the plaintiff had arranged with Brown Bros. & Co., bankers of New York, for credit sufficient to provide for the payment of the shipment of 100 tons of spelter as ordered by plaintiff on April 24, 1915. Defendant was notified of this fact, and it notified Brown Bros. & Co. that inasmuch as a proposition of defendant to sell the spelter to plaintiff had not been accepted by the latter, "you can return this money so far as we are concerned." April 26, 1915, plaintiff wrote defendant confirming its telegram of April 24th and stating in the letter that "You will understand this is the 100 tons bought last month, and we shall be glad if you will arrange immediate delivery." April 26, 1915, plaintiff in reply to defendant's cablegram of April 24, 1915, by cablegram stated:

> "Surprised your cable spelter definitely accepted in your cable March fifteenth."

April 27, 1915, defendant wrote plaintiff in substance that defendant was not bound by any contract to deliver the spelter as insisted upon by plaintiff. In this letter, as in other correspondence and cablegrams between the parties, it is very definitely shown that defendant's refusal to deliver the spelter was based upon the ground that it had not entered into any contract with plaintiff for the delivery thereof.

It is contended that no contract existed between the parties and that even if it can be said that a contract had in fact been executed between them, the plaintiff had not performed material things required of him thereunder; that defendant had failed to establish a Chicago credit, which latter reason is not the one relied upon by defendant at the time of its alleged breach

of the contract. At that time and subsequently defendant insisted that it was not bound by the contract to deliver the spelter because, as it contended, plaintiff had not accepted defendant's proposition of March 15, 1915. The cablegram of March 16th was an unconditional acceptance of a proposition made by plaintiff on March 10th. Plaintiff's cablegram of March 10th contains an unconditional offer to accept 400 tons of Virgin spelter at 40 Pounds per English ton f. o. b. Philadelphia, for April shipment. This offer when accepted by defendant, as it was, conferred upon plaintiff the right, having first established a banker's credit at Chicago, to demand a shipment at Philadelphia at any time during the month of April, 1915, of 100 tons of spelter at the price agreed upon. It is true that plaintiff's cablegram requested defendant to "cable confirmation, also percentage purity." As we interpret this message the cableing of the confirmation and of the percentage of purity of the spelter completed the terms of the contract. That this construction of the contract fairly expresses the actual intention of the parties is shown by the language of defendant's cablegram of acceptance, which expressly accepts the proposition tendered by plaintiff, and it further indicated that the spelter was to contain 98% zinc and not more than one-fifth of one per cent of iron.

The contract as executed by the parties called for the delivery of "Virgin Spelter." Evidence was introduced on the trial which tended to prove that Virgin spelter is made from ore and is distinguished by its name from spelter produced from re-run spelter or zinc or from scrap material; that Virgin spelter has a wellknown character in the zinc market; that it is always produced from ore; that when so produced it contains an uncertain quantity of impurities; that it usually contains 98%

zinc and not more than 8/100 of 1% iron. Witnesses testified, however, that the impurities in Virgin spelter had no fixed relation to the whole quantity of the material. Defendant contends that a new element was inserted in the contract, namely, the statement in defendant's cablegram that the spelter was to be 98% zinc and was to contain not more than 1/8th of 1% of iron. This statement was included in the cablegram because the plaintiff had asked for it. It does not appear from the language used by either party that the final acceptance of the contract was to depend upon this element. Plaintiff had unconditionally accepted defendant's offer and this acceptance was not modified or suspended by its request for information concerning the percentage of impurities in the material. We think it may be held that plaintiff intentionally permitted defendant to state in its acceptance of plaintiff's proposition the "percentage of purity" in the material which defendant was required to deliver to plaintiff under the terms of the contract. This construction of the contract finds support in the authorities cited. In Pomeroy on Contracts, 2nd ed., sec. 64, it is said:

> "Every provision in the acceptance, however, which is not embraced in the offer, does not necessarily constitute a substantive new term, and so prevent the requested mutual assent. The proposal itself may expressly provide for such an additional feature to come from the other party, or even from a third person, and to form a portion of a completed contract. If, for example, the offer should leave some term to be determined in such a manner, an acceptance which made the decision would create a contract, since the proposer would, expressly or impliedly, agree to be bound thereby and the assent would thus be mutual."

The evidence shows that plaintiff when he made the proposition to purchase the material conferred upon defendant the privilege of fixing the quantities of pure or impure material to be contained in the spelter, subject, however, to the agreement that the material was to be Virgin spelter, as that material is known in the market.

It is urged with persistence that the evidence shows that the plaintiff had not established Chicago credit as required by the contract. Had defendant admitted execution of the contract there might be some force in this contention, and also had defendant based its refusal to deliver the spelter on this ground it might have been quite possible for plaintiff to establish Chicago credit as required by the contract.

The evidence shows that the price of the material which constituted the subject matter of the contract had materially increased between the date of the contract and April 24, 1915. Defendant expressly notified plaintiff that because he had failed to formally accept defendant's acceptance of plaintiff's proposition no contract had been executed between the parties.

It is insisted that the judgment should be reversed because plaintiff did not prove that he was ready, able and willing to receive and pay for the property at the time it was ordered. Where it appears that a vendor absolutely denies that he has become a party to a contract with a vendee, or that he is bound by any promise to the latter, this fact will amount to a repudiation of the contract. Defendant's position is that no contract had been entered into between it and plaintiff. Having taken this position, it in effect repudiates the contract sought to be enforced by plaintiff. It is our view that defendant's cablegram of March 15, 1915, was an acceptance of the proposition contained in plaintiff's cablegram of March 10, 1915.

The evidence shows that defendant had repudiated the contract and as a consequence of this plaintiff had a right to adopt one of three courses. "He could treat the contract as rescinded and recover upon quantum meruit, or he could keep the contract alive for the benefit of both parties, or he could treat the repudiation as putting an end to the contract for all purposes

of performance, and sue for the profits he would have realized if he had not been prevented from performing, continuing the contract in force for the latter purpose only." L. S. & M. S. Ry. Co. v. Richards, 152 Ill. 59. Plaintiff has seen fit to choose the latter course.

When he ordered the material which constituted the subject matter of the contract, plaintiff met with a repudiation of the entire contract by defendant. It is difficult to understand why, in these circumstances, plaintiff was required, as insisted upon by defendant, to keep the contract alive for the benefit of both parties. Kadish v. Young, 108 Ill. 170. If the defendant had insisted that the establishing of credit in the New York market was not a sufficient compliance with the contract - if that had been the objection made to the order for the material - plaintiff might have been compelled to establish a credit in Chicago. This fact, however, was not relied upon by defendant and before the termination of the period fixed for the consummation of the contract, that is, before the end of April, 1915, defendant had indicated to plaintiff its repudiation of the contract.

In the case of Lehr Bottling Company v. Ferguson, 223 Ill. 88, the Supreme court said:

> "Appellee contends and the contention is supported by the evidence and the finding of the Appellate Court, that even if appellant's construction of this clause of the contract be granted, appellant had waived its rights to raise that question by its unconditional denial of liability on other grounds. There can be no doubt of the rule that a party having a right to insist upon a condition precedent to the payment of money or other performance on his part, will waive the condition precedent by a total denial of liability, or by placing his refusal to perform on other grounds. This rule has often been applied to contracts of insurance; but it is a salutary and well established rule of the common law, the application of which to all contracts will effect justice and cut off subsequently discovered excuses for the violation of contract engagements."

The time for a performance of his, defendant's, promise had arrived when plaintiff on April 24, 1915, made a demand for delivery of the material contracted for, on which date defendant made a denial of the existence of the contract. He did not merely indicate an intention not to be bound by the contract, - he said that he had not become a party thereto.

In Delaware & Hudson Canal Co. v. Mitchell, 92 Ill. App. 577, a case essentially similar to the present case, the court said:

> "Here was a breach of contract, if there was a contract, when Bogle refused to deliver the portion ordered in October, 1895. It was a complete repudiation of the entire contract. It amounted to a putting of an end to the contract so far as the appellant was concerned. Homelee v. Hall, 31 Vt. 582. It was not merely an announcement of an intention to refuse to carry out the contract, but there was an actual breach of it by the refusal to deliver the part ordered and a repudiation of the entire contract by a denial of its existence."

The authorities in the main sustain plaintiff's contention that the repudiation of a contract by a party thereto operates as a breach of the contract if the time for the performance of the contract has arrived. Davis v. Kronson, 2 N. D. 300; Danforth v. Walker, 37 Vt. 244.

Counsel for defendant have favored us with a brief consisting of 246 pages, in which other questions are discussed than those referred to. It will be impossible within reasonable limits to review these matters in this opinion. We have considered all that has been said in support of defendant's position on these questions and have come to the opinion that no reversible error was committed in connection therewith.

The judgment of the Municipal court is affirmed.

AFFIRMED.

McSurely and Matchett, JJ., concur.

286 - 26460

CORNELIA DE KEE,
Appellee,

vs.

BENJ. B. BURROWS,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

224 I.A. 643

MR. PRESIDING JUSTICE DEVER
DELIVERED THE OPINION OF THE COURT.

The plaintiff on September 29, 1919, purchased a squirrel skin coat for $155 from defendant. She thereafter brought suit in the Municipal court of Chicago, in which suit she charged that defendant did not deliver to her the coat which she had purchased, but delivered an inferior, soiled, worn and torn coat worth much less than the value of the coat purchased. The court found the issues for the plaintiff and a judgment was entered in her favor. Defendant brings the case by appeal to this court.

It is asserted that the judgment was against the manifest weight of the evidence and that even if it be assumed that plaintiff and her witness testified truthfully she would still have no legal ground for recovery. Neither contention of defendant is tenable. The plaintiff testified that the coat she purchased was not delivered to her; that the garment, which was delivered to her on Saturday, was soiled and torn; that the following Monday she returned it to defendant and asked for a refund of the money paid by her. Mrs. Anderson, who accompanied plaintiff at the time she purchased the garment, testified that she and plaintiff examined with care the garment purchased; that the coat delivered was not the coat which defendant sold to plaintiff; that the lining was sweated and showed that the coat had been worn; that it was soiled and torn. Testimony offered on behalf of defendant tends to contradict what

plaintiff and her witness said on the witness stand.

The question of fact could best be decided by the trial Judge, who had an opportunity to hear and see the witnesses. The evidence is of such character that we are not authorized to disturb his findings thereon.

The judgment of the Municipal court is affirmed.

AFFIRMED.

McBurely and Hatchett, JJ., concur.

381 - 26555

A. F. WANNER,
Appellee,

vs.

G. BERTELLI,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

224 I.A. 643

MR. PRESIDING JUSTICE DEVER
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought a fourth class action in the Municipal court of Chicago to recover $550 which he alleged in his statement of claim was due for services rendered by him to defendant in negotiating a sale of a printing press.

In an affidavit of merits defendant denied that plaintiff had rendered any services to him in negotiating the sale, and that he was indebted to plaintiff in any sum whatsoever.

The case was tried before a jury, which returned a verdict in favor of plaintiff for $500. Judgment was entered for this amount in plaintiff's favor and defendant brings the case by appeal to this court for review.

Evidence introduced on the trial tends to prove that defendant in the summer of 1919 listed a printing press for sale with plaintiff, who at the time was engaged in the business of selling new and second-hand printing machinery; that plaintiff advertised the property for sale and a Mr. Debus, representing a Muscatine, Iowa, newspaper, called at plaintiff's office and was thereafter taken to defendant's place of business to inspect the press; that Mr. Debus' principal offered plaintiff $2750 for the press. Plaintiff's evidence tends to show that he notified defendant by telephone that Mr. Debus was in town and that he might attempt to buy the press directly from defendant, and that de

assured plaintiff that he, plaintiff, would get his commission on the sale; that a few days following this telephone conversation the press was sold by defendant to Mr. Dehus' employer.

A principal contention is that the statement of claim was insufficient. Defendant filed his affidavit of merits thereto without making any objection to the statement. The action being one of fourth class, the statement herein, in the absence of any objection thereto in the trial court, will be held to be sufficient. Sher v. Robinson, 298 Ill. 181; Emberg v. City of Chicago, 271 Ill. 404.

The evidence introduced by plaintiff tends to show that the press was sold by defendant to a purchaser procured by plaintiff, who had prior to the sale offered to pay plaintiff $2750 for it. The jury were evidently impressed by plaintiff's evidence, and we are unable to say that it erred in finding the issues in his favor.

The judgment of the Municipal court is affirmed.

AFFIRMED.

McSurely and Matchett, JJ., concur.

herein.

428 - 26602

THE CHICAGO MUTUAL CASUALTY COMPANY,
Appellant,

vs.

MELBOURNE MORRISON,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

224 I.A. 643

MR. PRESIDING JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an action of replevin brought by plaintiff in the Municipal court of Chicago to recover possession of certain office furniture to which it is said plaintiff acquired title under a bill of sale dated February 16, 1920. The bill of sale is signed by A. M. Sonnenstein as grantor and is witnessed by E. Kreives, R. J. Buhler and G. Feinstein.

The defendant claims the right to possession of the property under a chattel mortgage executed October 11, 1919, by The Liberty Protective Company as grantor, by R. J. Buhler, President, and Herbert S. Rand, Secretary. The abstract of record does not set out the chattel mortgage or other instruments in writing introduced in evidence.

Buhler, president of the Liberty Protective Company, testified that the state had enjoined the company from doing business; that a receiver had been appointed for it and that it was thereafter, on October 11, 1919, released from the receivership; that he, Buhler, consulted with the State Insurance Commissioners, who advised him to form a new company. He further testified, "They" (insurance commissioners) "gave me the name of Chicago Mutual Casualty Company for the new company;" that he obtained a charter for the new company, which began doing business on February 16, 1920, at 431 South Dearborn street.

The evidence shows that the furniture at the time of the execution of the mortgage was located at 431 South Dearborn street at the place of business of the grantor, The Liberty Protective Company; that December 6, 1919, that company conveyed the furniture to Mr. A. M. Sonnenstein, who later became vice-president of plaintiff company, by bill of sale; that February 16, 1920, the day that plaintiff company began doing business, the furniture was conveyed by Sonnenstein to the new company, which was organized, as may be inferred from Buhler's testimony, to transact the business formerly carried on by The Liberty Protective Company.

Buhler, the president of The Liberty Protective Company, executed the bill of sale to Sonnenstein and was a witness to the bill of sale from Sonnenstein to the plaintiff. Buhler also became president of plaintiff company. The furniture remained throughout the whole time from the date of the execution of the chattel mortgage to the date of its foreclosure, April 22, 1920, at 431 South Dearborn street, the office of The Liberty Protective Company, and later that of the plaintiff, which claims to be a bona fide purchaser of the property.

There is some vagueness in the evidence as to what constituted the consideration for the execution of the chattel mortgage. It was given to secure the payment of a promissory note for $900. The defendant, Melbourne Morrison, holder of the mortgage, testified that he lent this sum to The Liberty Protective Company; that as further security in addition to the chattel mortgage he took stock in the company, "so I could have my people directors of the company."

At the time the mortgage was executed and delivered The Liberty Protective Company was in the hands of receivers and it was released therefrom immediately thereafter.

From the whole evidence in the case it is apparent

that The Liberty Protective Company was unable to proceed to do business after the execution of the note and mortgage because the defendant had refused to furnish further money to it. There is some dispute in the evidence as to whether the mortgage and note were executed in blank. There is ample evidence, however, to support a finding that these instruments were not executed in blank, as contended by the plaintiff. The chattel mortgage was not recorded. No one disputes the fact, however, that the property conveyed thereby remained at all times at the office at 431 South Dearborn street. On the whole evidence the trial Judge was justified in finding that the conveyance of the property by The Liberty Protective Company to A. M. Sonnenstein and by him to the plaintiff was merely colorable. It is quite clear from the record that the plaintiff company was organized to take over and transact the business which was formerly carried on by the grantor named in the mortgage.

The court had sufficient evidence before it to warrant a finding that the plaintiff was not a bona fide holder as against defendant of the property in question. Within a short time after Morrison advanced money to The Liberty Protective Company it went out of business. Buhler, its president, organized a new company, which transacted the same business in the same place, using therein the furniture which was conveyed under the chattel mortgage.

The law will not permit conduct of the sort shown by this record to prevail against one who has apparently acted in good faith.

It was held in the case of McDowell v. Stewart, 83 Ill. 538, that an unacknowledged chattel mortgage would have no effect upon the rights of third parties acting in good faith. The plaintiff through its president had full knowledge of defendant's rights under

the mortgage. Fuller v. Paige, 26 Ill. 358; Weill v. Zacher, 92 Ill. App. 296.

The judgment of the Municipal court is affirmed.

AFFIRMED.

McSurely and Matchett, JJ., concur.

434 - 26608

ALBERT C. WHITMAN, Appellee,	)	
vs.	)	APPEAL FROM SUPERIOR COURT OF COOK COUNTY.
KIRK & COMPANY, Appellant.	)	

224 I.A. 644

MR. PRESIDING JUSTICE DENEEN DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in the Superior court of Cook County against Kirk & Company and also an agent operating the Chicago & Northwestern Railway Company for the United States Government.

While the case was on trial in the lower court the plaintiff executed a covenant not to further prosecute his suit against the Chicago & Northwestern Railway Company in consideration of the payment to him of $7,500. The trial proceeded against Kirk & Company. The jury which tried the case returned a verdict in favor of plaintiff for $8,500, and the defendant, Kirk & Company, appeals to this court.

Defendant for reversal relies upon five propositions presented in its brief. Four of these propositions are that the evidence shows that plaintiff was guilty of contributory negligence; that plaintiff had no right of action under section 29 of the Illinois Compensation act; that the court erred in admitting certain evidence; and that the declaration states no cause of action. We have carefully examined the questions raised under these propositions and it is our conclusion that no reversible error was committed by the trial court in so far as these questions are concerned.

A further point is made, however, that plaintiff failed to establish by a preponderance of the evidence that Kirk & Company was guilty of negligence as alleged in the declaration. So far as

defendant Kirk & Company is concerned, the declaration charges in substance that the plaintiff, a switchman in the employ of the Chicago & Northwestern Railway Company, was injured through the negligence and carelessness of this defendant in that it caused a certain freight car, called in the evidence the "Corn Products car," to be moved toward and against a certain other freight car standing upon a switch track near a plant operated by defendant, as result of which negligence plaintiff's left hand was so seriously injured as to necessitate its amputation.

In addition to a plea of the general issue the defendant filed a special plea, which set up that defendant did not own, control, move, shove, or cause to be moved, the car the movement of which caused the injury to plaintiff.

Briefly stated, the facts in the case are as follows: Defendant owned and operated a manufacturing plant in Chicago located on the south side of East North Water street, an east and west street, situated immediately north of the Chicago river. Defendant also owned and used a coal yard situated immediately north of East North Water street and opposite to its manufacturing plant. In connection with its coal yard the defendant maintained a coal unloader and certain other coal unloading machinery. Coal was conveyed from the unloader to the manufacturing plant by means of a conveyor which extended beneath the street to a boiler room. Three tracks of the Chicago & Northwestern Railway Company, consisting of a main switch track and two side tracks, were laid down in East North Water street between the manufacturing plant and the coal yard. The northernmost of these tracks, a stub end track, was used for the reception of coal cars to be unloaded at the coal unloader. A fourth switch track extended along Austin avenue, an east and west street, located immediately north of the coal yard. This track and the stub end track joined in a

switch about 150 feet east of the unloader.

Plaintiff had been employed prior to the accident as a switchman for the Chicago & Northwestern Railway Company, and at times as its yard master, for a period of about eighteen years. It was a part of his duty at and before the date of the accident to distribute cars shipped over the railway company's lines to manufacturing plants located on both sides of East North Water street. On the day of the accident, November 19, 1920, he had made two or three trips along the north switch track on East North Water street to points east and west of Kirk & Company's plant. Just before the accident he and other men working with him in a switching crew were moving a car which had been placed on the Austin avenue switch track. At this time a coal car was standing on the track immediately south of the coal unloader. The corn products car was standing on the same track east of the coal car and about twenty feet west of the switch. This car had been placed on the track the evening before the accident.

For the purpose of removing the car from the Austin avenue track a box car was pushed ahead of a switch engine, with which plaintiff and other members of the switching crew were employed, westward past the switch which connected the coal track and the Austin avenue track, against the car on the Austin avenue track. These cars appear to have been equipped with automatic couplers, which failed to couple when the cars came in contact. This fact caused the car on the Austin avenue track to be bunted a short distance westward. Both the Austin avenue track and the coal track upon which the corn products car was standing had a down grade toward the east. After the car on the Austin avenue track had been bunted toward the west, plaintiff stepped on the track in front of and to the west of the car attached to the engine and attempted to adjust the chain attached to the coupling

pin, which had became jammed. While he was in this position the car which had been bunted to the west moved eastward on the downgrade and plaintiff's hand was caught and crushed between the drawheads of the two cars. Plaintiff testified that he did not go between the two cars until he had blocked the Austin avenue car which had been bunted westward; that just before his hand was caught he heard a crash and looked around in time to see the corn products car coming toward him.

Plaintiff's theory is that defendant's employes who were unloading coal from the coal car which stood on the track just south of the unloader, had, without warning to plaintiff, moved the corn produwts car in such manner that it struck against the car which plaintiff and other members of the switching crew were removing from the Austin avenue track and that thereby plaintiff, who stood in the track for the purpose of adjusting the coupling, was injured.

The evidence shows that two methods were employed by defendant at the unloader in unloading coal from cars. In some cases the coal was dumped from the car and shoveled into a hole in the floor of the unloading shed, where the coal fell upon a conveyor belt which carried it to defendant's plant on the south side of the street. In other cases, because of a different construction of car, the coal could be unloaded only from the top of the car by means of a worm conveyor which would be lowered into the car. In using this method it became necessary to move the car slowly from east to west by means of a power car puller.

The car which defendant's employes were unloading just before the accident was of the dump car type. Three men were employed in this work under the direction of defendant's engineer. Certain of these men testified that sometime before the accident the conveyor became clogged with coal; that under the engineer's

direction they started to work to clear the coal passageway - a work which usually took about an hour. In the main these witnesses testified that this work began about nine o'clock in the morning and was completed about ten o'clock; that thereafter they continued the work of unloading the coal car, which work was completed at eleven o'clock. It is asserted for the defendant that the accident happened while these men were in the passageway clearing the coal away from the conveyor belt.

Plaintiff was injured at about ten o'clock in the morning. He testified that as he and other members of his crew were approaching with the engine which was pushing the box car toward the scene of the accident, he saw three of defendant's employes about the cars on the coal track; that one of these men was standing at the east end of the cornproducts car with a pinch bar; that two men were working with a cable on the west end of "the middle car;" that these men moved cars every day with a cable and by pinch bars. He further testified that sometime before the accident, when he was passing the coal chute, one of the men asked him to switch two cars for them; "their conversation was that they wanted a switch to move them two cars out of there so that they could get the other car of coal."

The testimony of all of the witnesses for defendant who were employed at the coal unloader is to the effect that they were not present when the accident happened; that they were engaged in clearing away the coal from the conveyor belt.

It was shown by the evidence that the corn products car was placed upon the coal track by employes of the railroad company for their convenience in switching. The car was not consigned to defendant and it was not upon the coal track for a purpose in any way connected with its business. None of the witnesses of the switching crew except plaintiff testified that they saw any of

defendant's employes about the corn products car just before the accident happened. No witness testified that he saw any of defendant's employes or any other person move or attempt to move the corn products car, nor is there any direct evidence at all which shows that this car was blocked as it stood on the coal track. Excepting the testimony of the plaintiff there is no evidence in the record, either direct or circumstantial, which tends to show that the corn products car was moved by any act of defendant's employes. Plaintiff did say that one of these employes stood at the east end of the box car with a pinch bar, and that another was engaged at the west end of the coal car which stood at the unloader just before the accident happened. Plaintiff alone of all the witnesses who testified, says that just before the accident he saw the box car move toward the car on the Austin avenue track. In this particular he is not corroborated by any of the other members of the crew, except that one Cooper testified that sometime after the accident he saw the corn products car in contact with the Austin avenue car. Nor, aside from plaintiff's testimony, is there any evidence that defendant's employes were near the corn products car and none of them was discovered at the scene of the accident at the time of or just before it occurred. Three of these men testified that they knew nothing about the accident until the next day, and the engineer under whom they were employed said that he knew nothing about it until after plaintiff had been taken to a hospital. Plaintiff's testimony is to the effect that he did not observe whether the corn products car was blocked before the accident occurred; that he did not look to find out. He testified that the cars on the coal track could run down toward the east by gravity; "they certainly would start up by the jar of passing trains if they were not blocked. It would be the business of whoever put the cars on there to block them if they didn't want them to run away."

It is our opinion that the evidence as to what caused the movement of the corn products car, if it did move, as claimed by plaintiff, is insufficient to establish the charge made in the declaration that the car was moved by and through the negligence of the defendant. The presence of the corn products car on the coal track was due to the action of the Railroad company's employes. It was placed there for their convenience. Its presence there was in no way related to defendant or its business. The greater weight of the evidence shows that defendant's employes were not about the car at the time it moved toward the Austin avenue track, if it did so move. No duty rested upon defendant or its employes to block the car, nor is there any evidence which would authorize the jury to find that the car in fact was blocked just before the accident. Even plaintiff does not say that defendant's employes caused the car to move. It is sought by inference to charge defendant with liability for the accident because, as plaintiff testified, the car moved and struck the car on the Austin avenue track, and that just before this happened he saw one of defendant's employes with a pinch bar at the east end of the corn products car. This employe and all of the other employes of defendant engaged in unloading the coal car in effect flatly deny this testimony. It is our view that the evidence in the record does not sufficiently show that the defendant was guilty of the negligence charged against it.

The judgment of the Superior court is reversed and the cause remanded to that court for a new trial.

REVERSED AND REMANDED.

McSurely and Matchett, JJ., concur.

451 - 26625

ELIZABETH FRESHORN,
Appellee,

vs.

RUDOLPH LEWY and HARRY RUBLOFF,
Copartners Trading as Rudolph
Lowy & Company, On Appeal of
Harry Rubloff,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

224 I.A. 644

MR. PRESIDING JUSTICE DEVER
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in the Municipal court of Chicago to recover rent alleged to be due under the terms of a written lease executed on the 6th day of November, 1917. A judgment was entered in favor of the plaintiff for $525, which defendant Harry Rubloff seeks to reverse by appeal to this court.

The lease was signed for the lessees, "Lowy & Company" and "Rudolph Lowy." Plaintiff insists that defendant Rubloff was a partner in the business conducted under the name "Lowy & Company," and that he had held himself out as such.

Rudolph Lowy, one of the defendants, called as a witness for plaintiff under Section 33 of the Municipal Court Act, was asked who constitutes the firm of Lowy & Company, and he answered, "Harry W. Rubloff and myself." He further testified that he, the witness, occupied the premises in question under the name of Lowy & Company. Plaintiff testified that negotiations which finally led to the execution of the lease were had between defendant Rubloff and herself; that the lease was executed in Mr. Rubloff's office in his presence and that at this time he, Mr. Rubloff, stated that "Mr. Lowy and his brother were going to run the store for him."

We think the evidence tends to show that the defendant Rubleff held himself out to be the partner of Lowy, who executed the lease for Lowy & Company. November 30, 1917, Rubleff wrote a letter to plaintiff complaining of the condition of the store premises. In this letter he very definitely assumes to have had an interest in the store and the business conducted there. One paragraph of the letter is as follows:

> "I beg to inform you that we are going to have this work done and deduct the amount we pay out from the next rent. We intend doing the same thing with the paint job unless you take care of it."

The findings and judgment of the trial court are well supported by the evidence, and the judgment will therefore be affirmed.

AFFIRMED.

McSurely and Matchett, JJ., concur.

173 - 26832

FRED HELLER,
Appellee,

vs.

NORTH AMERICAN UNION,
a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

224 I.A. 644

MR. PRESIDING JUSTICE DEVER
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in the Municipal court of Chicago as beneficiary named in a certificate of insurance issued by defendant, North American Union, in January, 1909. The insured, who was plaintiff's wife, died March 1, 1920. Judgment was entered for $500 in favor of plaintiff, which defendant seeks to reverse by appeal to this court.

Proofs of death filed with defendant recite that the immediate cause of insured's death was apoplexy; that the duration of her last illness was one day and that a contributing cause of her death was arterio sclerosis of three years duration.

Payment of the claim was denied on the ground that insured became suspended on June 1, 1918, for nonpayment of dues for the month of May, 1918, as prescribed by defendant's by-laws. It is asserted that insured's failure to pay the May, 1918, dues before June 1, 1918, automatically suspended her membership; that insured in fact paid the dues for May, 1918, on June 11, 1918; that she was then reinstated in her membership; that she misrepresented the condition of her health at the time of her reinstatement and that she had been afflicted with arterio sclerosis for a period of about two years prior to her reinstatement and thereafter until the time of her death.

Under defendant's by-laws a delinquent member of one of its associate councils might by making a true statement that she was in good health at the time of an application for reinstatement be reinstated in her membership.

Law 9, section 12, of defendant's by-laws, which deals with the subject of suspensions and reinstatements, provides in part,

> "that in any particular case such applicant may by the general manager be required to also undergo a medical examination at the expense of the order, and if such examination at the time be not approved by the medical director, the application for reinstatement shall be rejected, and all moneys paid by the applicant on the filing of the application shall be returned to her.
>
> The payment and receipt of such arrearages without being accompanied by the statement and certificate of good health required by this section or the receipt and retention of the amount of such payment in case it shall thereafter appear that the said applicant was not in fact in good health or was engaged in a prohibited occupation or if the application for reinstatement shall be rejected by the medical director, shall not in any or either of such cases, have the effect of reinstatement of such applicant, and in such case neither she or her beneficiary shall be entitled to any rights or benefits by or under her benefit certificate."

Another of defendant's by-laws provides that none of its subordinate bodies:

> "shall have any power or authority for or on behalf of the North American Union, to waive, modify or annul any provision of the constitution or laws of the order, or of any requirement thereof."

The by-laws further provide that in case a member defaulted in payment of dues, such member and her beneficiary thereby forfeited all rights acquired by membership in defendant or its subordinate councils.

The evidence shows that the insured suffered a stroke of apoplexy in 1917, which partially paralyzed her left side; that she was at this time treated by a physician and that she had not entirely recovered from her illness at the time of her reinstatement in June, 1918. She was taken ill on June 5, 1918, with a

Tabor Martyr's Up-Lines a delightful chapter of the of the de-
partment commission giving a lucid exposition that the man
is good health at the time of in reliability for mechanical
to discharge is fact wonderfully.

Law 9, section 12, of Intermediate Systems. Also
deals with the subject of commercial and military area,pre-
vious is part.

There is one particular case worth mentioning here. In the year
and managed to maintain at the Station a number of engine-
plus at the expense of the author, and if just consideration of
the time is not required by the Central Directory, the single
section for relationship shall be employed. Not all, however,
pain in the difficult or the of the conditions that
be replaced in law.

The journal and report of with experience a final ex-
ter examination in the activities and qualities of such tests
relative to this section or the results and relative of the
number of them present is case is shall (Paragraph 1) only that
the said efficient was not in fact for when tested it was ex-
posed to a prolonged occupation or in the circumstances for
circumstances shall be relative to the. Method 1 (Paragraph
shall not in any or either of such cases, from the circuit of
relationship of such equipment, and in such case shall the
of her immediately shall be relative in any with or hence-
fide to be under for Method 1 certificate.

Impact of Reference by-Lines Interface view some
of its Electrical Value:

Which have any power or relationship for the or result or the
There Section Union, in order, shall be cited not single
also at the specification or line of the power, or of the ex-
pressed Method.

The Up-Lines Intermediate Shall is note a number
Reference in support of them. Such number and her invariably
Energy Certain all place accurate to relatively in Relevant
of the electrical Section.

The evidence shows that the Journal reflecting a strong
of employer in 1917, which particularly permitted her left side; that
she was at this time received by a deputation and that she had
entirely recovered from her illness at the time of her retirement
made in June, 1918. The was there all on June 8, 1918, with-

second stroke of apoplexy and was at this time treated by a Dr. Ventzel; that he called upon her almost daily until July 5, 1918, and continued to treat her until February, 1919. The evidence tending to prove that insured was not in good health at the time of her reinstatement in June, 1918, is very strong although there is some evidence of a not very convincing character that she was not in poor health at this time. The fact appears, however, that the insured on June 1, 1918, was in arrears in payment for the May 1918 dues, amounting in all to $1.11, being 86¢ for an assessment and 25¢ for associate council dues.

It is urged that a document described in the briefs as Exhibit 2, being the alleged application for reinstatement, was not admitted in evidence for the reason that the paper was not signed by the insured nor by any person duly authorized by her to sign it. The evidence tends to show that this document was signed by insured's daughter and that she had no authority on behalf of the insured to sign the paper. This exhibit does not appear in the abstract of record, and we will therefore not search the record for it for the purpose of reversing the judgment. So far as the evidence, as shown by the abstract of record, indicates, no false statement as to the condition of her health was made by the insured, and while there is a dispute in the evidence as to just when the delinquent dues were paid, it does appear that they were paid to and received by the associate council in the early part of June, 1918, and that thereafter the council received dues from insured for several months up to the time of her death in March, 1920. Our attention has not been directed to any record of defendant, or its associate council, of which insured was a member, which tends to disclose that the insured was in fact suspended. A certain exhibit, being a report of an officer of the

associate council to defendant, shows that during the month of June, 1918, two members of the associate council were suspended for failure to pay May, 1918, dues, but this record does not indicate what members were suspended, nor does it disclose that insured was suspended, as alleged, although there was some oral testimony, which we think was inadmissible, tending to prove this fact. However, sections 8 and 9 of Law 4 of defendant's by-laws, which do not appear in the abstract of record and which we would not examine except for the purpose of affirming the judgment, provide as follows:

> "8. Each subordinate council shall appropriate out of its general fund a sufficient sum for the purpose of constituting a fund to be called the 'Delinquent Members' Fund', and all members of such council who have been members of the Order for one year or more, shall be entitled to the benefit of such fund in the manner and upon the terms provided by the laws of the Order. On the last day for the payment of combined monthly premiums the collector shall ascertain the amount due thereon from all members who have not paid the same, who are entitled to the benefit of such fund, and he shall then draw from said delinquent fund the amount required and apply the same in payment of such delinquent member's combined premiums."
>
> "9. The payment made by the collector in accordance with the foregoing section shall be considered as a loan from the Council to the delinquent members and the member receiving the benefit of said loan shall refund the amount advanced for him, and in addition thereto, pay a fine of 25 cents for said loan, which said fine shall be credited to said 'Delinquent Members' Fund.'"

The evidence contains no proof that the associate council of which insured was a member had not set aside a "Delinquent Members' Fund" as expressly directed by defendant's by-laws, out of which the insured's delinquent dues had been or could have been paid. If, as a matter of fact, the associate council had complied with these laws, then a fund existed to which the insured and other members had contributed out of which the insured's delinquent dues for May, 1918, could have been and should have been paid; and in that event, questions as to the state of insured's health from June 1, 1918, to June 11, 1918,

would become immaterial. The evidence does show that the insured contributed to the associate council's general fund for a period of about twelve years; that during this time her dues had been delinquent on several occasions, which delinquencies were taken care of by the associate council.

> "Contracts of this character are entirely of the insurer's own making and are to be construed strictly against the company and liberally in favor of the insured. As said by this court in Grand Lodge Select Knights v. Beaty, 224 Ill. 346: 'It is axiomatic in the law of insurance that the contract shall be liberally construed in favor of the insured and strictly construed against the insurer, and where two interpretations, equally reasonable, are possible, that construction should be adopted which will enable the beneficiary to recover.'" Zeman v. North American Union, 263 Ill., 310.

On the whole evidence we think the judgment of the Municipal court is correct and that it should be affirmed.

AFFIRMED.

Matchett, J., concurs.

McSurely, J., dissents.

173 - 26832

FRED HELLER,
Appellee,

vs.

NORTH AMERICAN UNION,
a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

224 I.A. 644

MR. PRESIDING JUSTICE DEVER
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in the Municipal court of Chicago as beneficiary named in a certificate of insurance issued by defendant, North American Union, in January, 1909. The insured, who was plaintiff's wife, died March 1, 1920. Judgment was entered for $500 in favor of plaintiff, which defendant seeks to reverse by appeal to this court.

Proofs of death filed with defendant recite that the immediate cause of insured's death was apoplexy; that the duration of her last illness was one day and that a contributing cause of her death was arterio sclerosis of three years duration.

Payment of the claim was denied on the ground that insured became suspended on June 1, 1918, for nonpayment of dues for the month of May, 1918, as prescribed by defendant's by-laws. It is asserted that insured's failure to pay the May, 1918, dues before June 1, 1918, automatically suspended her membership; that insured in fact paid the dues for May, 1918, on June 11, 1918; that she was then reinstated in her membership; that she misrepresented the condition of her health at the time of her reinstatement and that she had been afflicted with arterio sclerosis for a period of about two years prior to her reinstatement and thereafter until the time of her death.

[illegible]

[illegible]

[illegible]

Under defendant's by-laws a delinquent member of one of its associate councils might by making a true statement that she was in good health at the time of an application for reinstatement be reinstated in her membership.

Law 9, section 12, of defendant's by-laws, which deals with the subject of suspensions and reinstatements, provides in part,

> "that in any particular case such applicant may by the general manager be required to also undergo a medical examination at the expense of the order, and if such examination at the time be not approved by the medical director, the application for reinstatement shall be rejected, and all moneys paid by the applicant on the filing of the application shall be returned to her.
>
> The payment and receipt of such arrearages without being accompanied by the statement and certificate of good health required by this section or the receipt and retention of the amount of such payment in case it shall thereafter appear that the said applicant was not in fact in good health or was engaged in a prohibited occupation or if the application for reinstatement shall be rejected by the medical director, shall not in any or either of such cases, have the effect of reinstatement of such applicant, and in such case neither she or her beneficiary shall be entitled to any rights or benefits by or under her benefit certificate."

Another of defendant's by-laws provides that none of its subordinate bodies:

> "shall have any power or authority for or on behalf of the North American Union, to waive, modify or annul any provision of the constitution or laws of the order, or of any requirement thereof."

The by-laws further provide that in case a member defaulted in payment of dues, such member and her beneficiary thereby forfeited all rights acquired by membership in defendant or its subordinate councils.

The evidence shows that the insured suffered a stroke of apoplexy in 1917, which partially paralyzed her left side; that she was at this time treated by a physician and that she had not entirely recovered from her illness at the time of her reinstatement in June, 1918. She was taken ill on June 5, 1918, with a

second stroke of apoplexy and was at this time treated by a Dr. Wentzel; that he called upon her almost daily until July 5, 1918, and continued to treat her until February, 1919. The evidence tending to prove that insured was not in good health at the time of her reinstatement in June, 1918, is very strong although there is some evidence of a not very convincing character that she was not in poor health at this time. The fact appears, however, that the insured on June 1, 1918, was in arrears in payment for the May 1918 dues, amounting in all to $1.11, being 86¢ for an assessment and 25¢ for associate council dues.

It is urged that a document described in the briefs as Exhibit 2, being the alleged application for reinstatement, was not admitted in evidence for the reason that the paper was not signed by the insured nor by any person duly authorized by her to sign it. The evidence tends to show that this document was signed by insured's daughter and that she had no authority on behalf of the insured to sign the paper. This exhibit does not appear in the abstract of record, and we will therefore not search the record for it for the purpose of reversing the judgment. So far as the evidence, as shown by the abstract of record, indicates, no false statement as to the condition of her health was made by the insured, and while there is a dispute in the evidence as to just when the delinquent dues were paid, it does appear that they were paid to and received by the associate council in the early part of June, 1918, and that thereafter the council received dues from insured for several months up to the time of her death in March, 1920. Our attention has not been directed to any record of defendant, or its associate council, of which insured was a member, which tends to disclose that the insured was in fact suspended. A certain exhibit, being a report of an officer of the

associate council to defendant, shows that during the month of June, 1918, two members of the associate council were suspended for failure to pay May, 1918, dues, but this record does not indicate what members were suspended, nor does it disclose that insured was suspended, as alleged, although there was some oral testimony, which we think was inadmissible, tending to prove this fact. However, sections 8 and 9 of law 4 of defendant's by-laws, which do not appear in the abstract of record and which we would not examine except for the purpose of affirming the judgment, provide as follows:

> "8. Each subordinate council shall appropriate out of its general fund a sufficient sum for the purpose of constituting a fund to be called the 'Delinquent Members' Fund', and all members of such council who have been members of the Order for one year or more, shall be entitled to the benefit of such fund in the manner and upon the terms provided by the laws of the Order. On the last day for the payment of combined monthly premiums the collector shall ascertain the amount due thereon from all members who have not paid the same, who are entitled to the benefit of such fund, and he shall then draw from said delinquent fund the amount required and apply the same in payment of such delinquent member's combined premiums."
>
> "9. The payment made by the collector in accordance with the foregoing section shall be considered as a loan from the Council to the delinquent members and the member receiving the benefit of said loan shall refund the amount advanced for him, and in addition thereto, pay a fine of 25 cents for said loan, which said fine shall be credited to said 'Delinquent Members' Fund.'"

The evidence contains no proof that the associate council of which insured was a member had not set aside a "Delinquent Members' Fund" as expressly directed by defendant's by-laws, out of which the insured's delinquent dues had been or could have been paid. If, as a matter of fact, the associate council had complied with these laws, then a fund existed to which the insured and other members had contributed out of which the insured's delinquent dues for May, 1918, could have been and should have been paid; and in that event, questions as to the state of insured's health from June 1, 1918, to June 11, 1918,

would become immaterial. The evidence does show that the insured contributed to the associate council's general fund for a period of about twelve years; that during this time her dues had been delinquent on several occasions, which delinquencies were taken care of by the associate council.

> "Contracts of this character are entirely of the insurer's own making and are to be construed strictly against the company and liberally in favor of the insured. As said by this court in Grand Legion Select Knights v. Beaty, 224 Ill. 346: 'It is axiomatic in the law of insurance that the contract shall be liberally construed in favor of the insured and strictly construed against the insurer, and where two interpretations, equally reasonable, are possible, that construction should be adopted which will enable the beneficiary to recover.'" Zeman v. North American Union, 263 Ill., 310.

On the whole evidence we think the judgment of the Municipal court is correct and that it should be affirmed.

AFFIRMED.

Matchett, J., concurs.

McSurely, J., dissents.

145 - 26312

BERNICE BREWER, a Minor, by JAMES S. DEMING, her Guardian, Appellee,

vs.

NICHOLAS H. HALVORSEN and JOHN F. JELKE COMPANY, a Corporation, Appellants.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

224 I.A. 644

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Bernice Brewer, an infant, hereinafter called plaintiff, was struck by an automobile belonging to and driven by defendant Halvorsen while engaged in the business of his employer, the defendant John F. Jelke Company, a corporation. Suit was brought to recover damages for the injuries received, and upon trial plaintiff had a verdict against both defendants for $6,575, upon which judgment was entered, from which defendants appeal.

The accident happened about noontime September 6, 1918, at the intersection of California avenue, which runs north and south, and Fillmore street, which runs east and west in Chicago. Plaintiff, then three years old, lived with her parents on the east side of California avenue a short distance south of Fillmore. She was playing with her brother, about five years of age, in the front yard, while the mother was preparing the noonday meal and the father had gone to a grocery store nearby on the west side of California avenue. Upon returning he saw the two children on the west side of California avenue, which is sixty feet wide. They started to cross to the east side of the avenue, and the boy reached the east curb safely. The movements of plaintiff are the subject of variant testimony. The evidence of plaintiff's witnesses tended to show that she stopped near the center of the street, or

after having gone east of the center she returned to the middle of the street, apparently waiting for her father. Defendant Halvorsen, accompanied by Mr. William Steele, secretary of defendant Jelke Company, was coming from the south in an automobile. Their version is that the plaintiff got close to the east curb, but suddenly turned and ran west across the street directly in the path of the automobile.

There is conflict also as to the speed of the automobile. Plaintiff's witnesses estimated the speed as it approached Fillmore street at twenty to twenty-five miles an hour, while the two witnesses riding in the car testified that it was about ten miles an hour. The child when struck was at the north cross-walk or curbline of Fillmore street, and Halvorsen says he saw the two children crossing the street, with no grown person with them, when he was about 125 feet south of Fillmore street.

It is impossible for this court to determine conclusively which is the more credible version. It was peculiarly within the province of the jury, with its opportunities of observing the witnesses as they testified, to judge which narrative was more believable. We cannot say that the acceptance by the jury of plaintiff's version as to the occurrence with reference to the location of plaintiff when struck and as to the speed of the approaching automobile is so manifestly unwarranted by the weight of the evidence that we should reverse.

We have, then, an automobile at noonday on a wide, unobstructed street, approaching two little children crossing the street, seen by the driver while distant 125 feet plus the width of Fillmore street, and running the automobile at a speed of twenty to twenty-five miles an hour.

Plaintiff could not be guilty of contributory negli-

[illegible] [illegible] [illegible] [

gence. Chicago C. Ry. Co. v. Tuohy, 196 Ill. 416. It was the duty of the driver of the automobile, upon discovering the children in the street, to exercise a high degree of diligence in order to prevent injuring them. Perryman v. Chicago C. Ry. Co., 242 Ill. 269. It is the duty of those using the streets with vehicles, especially when driving where there are children, to expect that they will act upon sudden impulses and to take precaution accordingly. Roberts v. Ring, 143 Minn. 151.

Upon the facts as found by the jury the conclusion that the accident was caused by the negligence of defendant in driving the automobile at a high rate of speed, as charged in the declaration, was justified.

The trial Judge in giving the forms of verdict to the jury told it orally which form the jurors should sign, as they might find for the parties respectively. Such verbal directions were not instructions upon the law; this has been the practice for many years. I. C. R. R. Co. v. Wheeler, 149 Ill. 528; White-Kingsland Mfg. Co. v. Herdrich, 98 Ill. App. 607.

It is claimed that the damages are excessive. The plaintiff received a fracture of the femur and also a trauma producing an inguinal hernia. She received the usual treatment for the broken leg, lying in bed for eight weeks with a heavy weight attached. She wore a steel hip brace for about eight months. There is evidence that the injured leg is slightly shorter than the other. Doctors testified that the only cure for the hernia was by an operation. The judgment is perhaps large, but we have no satisfactory reasons for finding it to be excessive.

Complaint is made because defendant's physician was not allowed to examine plaintiff at the time of the trial after her mother had consented to an examination. This consent was ob-

power. Gabriel v. Ex. Ex. v. Lewis, 193 111. 600. It was the duty of the driver of the automobile, upon discovering the situation in the street, to exercise a sound degree of caution to avoid injuring passed injured them. Freeman v. Gulick, 2 Ill. App. 267 111. 608. It is the duty of those using the streets, in order, to avoid unnecessarily some injuring where their conduct, is likely that they will not have sufficient opportunity and is have reasonable manoeuvrability. Gaskin v. Kane, 243 Mass. 121.

Upon the facts as found by the trial court, the conclusion that the accident was caused by the negligence of defendant is clearly the authorized as a high rate of speed, in violation of the intoxicating, was justified.

The final finding in giving the force of verdict to the jury fails to satisfy which the jury should find, or that the defendant was the negligent party. Some reason should be the instructions upon the law; this was not the decision for the jury. Chicago, I.&.S.R.Co. v. Hawkins, 147 111. 601; Illinois Central R.R. v. Hawkins, 84 111. Dec. 627.

It is claimed that the damages are excessive. The plaintiff requires a reduction or the court not view a fresh trial. Bradley v. Hopkins Brewing. The evidence is clear concerning the Tuesday lay, Tylor is had his right hand with a lamp which allowed. The were a great lot. Doctor for their right hand. Those is evidence that the injured boy is totally disabled from the right. Defendant contends the only hope for the injured was by an amputation. The judgment is perhaps large, but we have no satisfactory reason for finding it is to be excessive.

Complaint is made because defendant's objection was not allowed to question relative to the time of the trial after the motion had expired at the end of the trial. This question was for

tained early in the trial and when towards its conclusion defendant produced a doctor to examine pla ntiff, plaintiff's counsel objected on the grounds that the physician who had testified on behalf of plaintiff had left. However this may be, plaintiff was not obliged to submit to an examination, and the incident is not of sufficient prejudicial importance to require a reversal.

For the above reasons the judgment is affirmed.

AFFIRMED.

Dever, P. J., and Matchett, J., concur.

173 - 26343

MABEL I. VARGAS,
Appellee,

vs.

REINHOLD KLAR,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

224 I.A. 644

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit alleging the wrongful conversion by defendant of a fur cape left by plaintiff with defendant for the purpose of having alterations made. Upon trial by the court plaintiff had judgment for $400.

It is not denied that plaintiff left the cape with defendant at his fur store and workshop in Chicago. There was some testimony offered by defendant tending to show that it was brought there to sell. However, we think the court could properly accept plaintiff's version, which was that she had had two prior conversations with defendant for the purpose of getting a price on the alterations, and subsequently, on January 2, 1930, took the garment to defendant's store and left it with his daughter, who was in charge of the premises. Subsequently plairtiff called at defendant's store and was told by him that his daughter had reported to him about the garment, but that he had not yet had time to examine it, and plaintiff was told to call later by telephone. Two days later she telephoned and was informed by defendant that the garment had been stolen. Plaintiff never recovered it. Defendant introduced evidence which at most raises a suspicion that the garment was stolen by two strangers who came into the store on the evening it was left with defendant.

It is the rule that upon proof by the bailor that property has been placed in the hands of a bailee for hire and the same has not been returned on demand, it will be presumed that

the bailee was negligent in caring for the same, and the fact that it might have been stolen does not relieve the bailee from liability. Miles v. International Hotel Co., 289 Ill. 320; Schaefer v. Safety Deposit Co., 281 Ill. 351; McCurrie v. Hines Lumber Co., 178 Ill. App. 617.

The trial court could properly conclude that defendant failed to show that the disappearance of the garment was through no negligence on his part. The impression is given that the theft was committed while plaintiff's daughter, who was in charge of the store at the time, answered a telephone call, leaving this and other valuable furs within reach of the alleged thieves.

After judgment in the Municipal court a motion was made by defendant to set it aside and grant a new trial on the ground of newly discovered evidence. This was supported by affidavits tending to establish the identity of the persons who stole the cape from defendant on or about the time it disappeared. Even if this were the fact it would not be sufficient to justify a new trial. It was not shown that the alleged thief would appear to testify, and even if he should, the trial court could still properly hold that the opportunity for the theft was given by the careless conduct of defendant or his representatives.

We do not find sufficient reason to reverse the judgment and it is affirmed.

AFFIRMED.

Dever, P. J., and Matchett, J., concur.

the bailee was negligent in caring for the cows, and the fact that it might have been wrong does not relieve the bailee from liability. Ellis v. International Harv. Co., 258 Ill. 267; Schafer v. Chicago Herald Co., 98 Ill. 474; Gorrill v. Chicago Junction Ry., 198 Ill. App. 417.

The trial court could properly conclude that defendant failed to show that the transportation of the animals was through no negligence on its part. The information in issue was the theft was committed while availability bailment, who was in charge of the cows at the time, manager a telephone call, leaving the cows without supervision for a period of the alleged theft.

After judgment in the Municipal Court a motion was made by defendants to set it aside and grant a new trial on the ground of newly discovered evidence. This was supported by an affidavit tending to establish the identity of the person who stole the cows from defendant, as well as the time of disappearance. Even if this were the fact it could not be sufficient to justify a new trial. It was not shown that the alleged thief would testify, nor even if he should, the trial court could well properly hold that the correctness of the theft was given by the Municipal Court's of defendant to its representation.

We do not find sufficient grounds to reverse the judgment and it is affirmed.

Affirmed.

Sears, P. J., and McGoorty, J., concur.

32 - 26351

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

JACOB ROZKORCINSKI,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

224 I.A. 645

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendant was charged with obtaining money by false pretenses upon information filed by Anton Kaczorowski, and upon trial by the court was found guilty and sentenced to the House of Correction for thirty days and fined $100.

The complaint grew out of a contract for sale of an automobile which apparently belonged to defendant's wife. The complaining witness, Kaczorowski, testified that he paid $200 to defendant on account of the purchase of the automobile, but subsequently learned that defendant's wife was its owner and that she would not sell it, and that defendant refused to give him his money back.

Defendant testified that he was authorized to sell the automobile and made a contract of sale with the complaining witness for $1050, that he received $200 on the contract and offered to deliver the machine upon the payment of the balance of the purchase price, but complaining witness claimed the return of his money. The wife of defendant offered to testify that she never refused to sell the complaining witness the automobile and that her husband was authorized to make the contract of sale.

This evidence did not justify the trial court in finding defendant guilty. Complaining witness did not undertake to say more than that he was informed that defendant's wife

would not sell the machine. This was not sufficient to establish the fact. If he meant that he was so informed by defendant's wife, then she should have been permitted to testify as to defendant's authority to sell the machine and to any refusal to deliver it upon payment of the balance of the purchase price.

The judgment is reversed and the cause is remanded.

REVERSED AND REMANDED.

Dever, P. J., and Matchett, J., concur.

204 - 26377

MURRAY WALBACH,
Appellee,

vs.

EFFIE B. TAYLOR,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

224 I.A. 645

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendant appeals from an adverse judgment upon an instructed verdict in a forcible detainer suit.

Plaintiff's case was the testimony of defendant that she occupied the premises in question, an apartment at 1064 Berwin avenue in Chicago, and that a certain notice was posted on the door of the apartment to the effect that her tenancy would terminate June 30, 1920, which notice was signed, "Murray Wolbach by Asa G. Adams, his attorneys;" that she occupied the premises in May, June and July and was still occupying them at the time of the trial and that she had never had a written lease between plaintiff and herself. Plaintiff thereupon rested his case. The evidence on behalf of defendant tended to show that the property belonged to a Mr. A. B. Fosse, and that there was a written lease from him to defendant of the premises.

In a forcible detainer suit the plaintiff must show right to possession in himself. He cannot rely upon the lack of right of the person whom he seeks to dispossess. Szulcrecki v. Oppenheimer, 283 Ill. 525, at 530; Fitzgerald v. Quinn, 165 Ill. 354; Thompson v. Sprague, 197 Ill. App. 197. There is no evidence whatever as to what interest in or right to possession of the premises plaintiff may have. It is not shown that defendant ever

attorned to him as landlord; rather the evidence seems to indicate that she was a lessee from Fosse, the owner. The record did not justify a finding for plaintiff.

Under the amendment of section 81 of the Practice act it is not necessary to except to all adverse rulings or the entry of judgment in order to preserve the same for review. Miller v. Anderson, 260 Ill. 608; Green v. Streitmatter, 183 Ill. App. 25; Christianson v. Devine, 210 Ill. App. 263.

The judgment of the Municipal court is reversed.

REVERSED.

Dever, P. J., and Matchett, J., concur.

allowed to take an unfavorable inference from evidence which is susceptible of two or more explanations, one of which would be in favor of the accused. The jury should not justify a finding into speculation.

Under the circumstances of evidence in this case, it is not necessary to decide as to whether or not the evidence would be sufficient to support a verdict of guilty, or if the evidence is wholly circumstantial, the proof must be of such character as to exclude every other reasonable hypothesis of innocence. State v. Lawrence, 240 Ill. 494; Lyons v. Commonwealth, 117 Ky. 828; Commonwealth v. Barton, 12 Gray, 259. The judgment of the court below must be reversed.

Reversed.

Dwyer, P. J., and Gridley, J., concur.

222 - 26395

JACOB FOLTZ,
Appellee,

vs.

NORTH AMERICAN BREWING COMPANY,
a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

224 I.A. 645

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover damages for a breach of a contract whereby defendant agreed to sell plaintiff a quantity of beer at certain prices per barrel. Upon trial a verdict was favorable to plaintiff and judgment for $1716.50 was entered, from which defendant appeals.

The contract in question was in writing, executed by both parties, dated September 7, 1917. Defendant agreed thereby to supply plaintiff with fifteen hundred barrels of beer at $5.25 a barrel, of a brand known as Lager, and $6 for a brand known as Extra, and plaintiff agreed to use exclusively in his place of business the beer manufactured by defendant from the date of the agreement until the fifteen hundred barrels had been used.

The jury could properly believe that sometime thereafter the market price of beer went up and defendant attempted repeatedly to get plaintiff to agree to a new contract at increased prices, but plaintiff refused. Defendant finally refused to make deliveries and plaintiff thereupon bought beer of the defendant for cash at the increased prices demanded by defendant, but such payments were always made under protest, plaintiff claiming that he was entitled to the beer at the contract prices.

The jury was justified in concluding that this did not amount to a modification or change of the terms of the written contract and that the repudiation of the contract by defendant amounted

to a breach for which plaintiff was entitled to recover damages.

It is said that plaintiff failed properly to prove the amount of damages. March 20, 1918, defendant sent a communication to plaintiff which amounted in substance to a refusal to deliver any more beer under the contract. Under such circumstances the trial court properly ruled that this fixed the time of the breach and that the measure of damages was the difference between the contract prices and the market prices at that time.

Some argument is made against the validity of the contract, although the point is not made in defendant's brief. Similar contracts have repeatedly been held valid. Minnesota Lumber Co. v. Coal Co., 160 Ill. 85; Finch & Co. v. Zenith Furnace Co., 245 Ill. 536.

We see no sufficient reason to disturb the judgment and it is affirmed.

AFFIRMED.

Dever, P. J., and Matchett, J., concur.

243 - 26416

OTTO L. PITSCH,
Appellant,

vs.

CONTINENTAL & COMMERCIAL NATIONAL BANK OF CHICAGO, a Corporation,
Appellee.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

224 I.A. 645

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Complainant filed a bill for an accounting which after hearing by the Chancellor was ordered dismissed for want of equity. Complainant appeals.

Defendant is engaged in the general banking business in Chicago and complainant, a notary public, was one of its employes. The bill prayed for an accounting for notarial fees collected by defendant as a result of services rendered by complainant as notary public, incident to the protest of commercial paper belonging to defendant or received by it from its correspondents. The bill charges that complainant devoted his time exclusively to protesting commercial paper and for these services received no compensation other than 12½ per cent. of all notary fees collected by defendant for such protests, and claims that under the statute he was entitled to the entire amount of the notary fees. An answer was filed and also the statute of limitations was pleaded. It was admitted that the statute had run as to any protest fee made prior to February 10, 1914, and the period sought to be covered by the accounting was from that date to December 31, 1918.

It was shown upon the hearing that complainant was originally employed by defendant under a contract dated September 29, 1911, which provided for employment for a year, and that complainant when requested to act as notary in protesting paper should receive 12½ per cent. on all fees received by defendant on commercial

paper protested at its bank. Two notaries were working for defendant so that it was intended by this arrangement each should receive 12½ per cent. on all fees collected, which equals 25 per cent. of the whole amount. Every two weeks the amount due complainant on account of these fees was computed and he was given a cashier's check for the same and executed a receipt as follows:

> "Received of Continental & Commercial National Bank of Chicago on dates below indicated the sum due me in full payment and satisfaction for all services rendered by me for said bank and all claims up to and including such dates; in consideration of the agreement by said bank to continue me in its employ at the same compensation for the next succeeding half month to perform like services as those heretofore performed and for other considerations, I hereby release and discharge said bank from all claims against it up to and including such dates and assign to said bank all sums due or owing to me from said bank for fees earned as notary public in the half month preceding the respective dates set opposite my name."

It was also shown that complainant in addition shared in a bonus given by the bank to its employes and acknowledged and received the same as "special salary payment due." Complainant's services with defendant ended December 31, 1918, and thereafter he made a demand for the balance of notarial fees claimed to be due him, which was refused.

As noted in the briefs filed, this court has already had in a similar case substantially the same question as is now presented. Munsing v. Corn Exchange Bank, 173 Ill. App. 53. We there held in substance that whatever may be the rule as to the validity of the contract of employment in the first instance, there was nothing invalid in an agreement to assign and transfer such notarial fees after they had been earned and collected. In that case we held that plaintiff, by accepting a salary in lieu of the notarial fees, without demanding more or asserting any claim for other compensation over a period of years, knowing that the bank had in its possession the money represented by such fees, thereby assigned any fees then collected, and having so assigned and transferred all his interest in the fees, he had created an effectual [illegible]

owner's

We cited with approval Hobbs v. City of Yonkers, 32 Hun. 454, affirmed in 102 N. Y. 13, and Second National Bank v. Ferguson, 114 Ky. 516.

In that case we construed the acts of plaintiff to amount to an assignment. In the instant case there is an express assignment to the bank. The bi-monthly receipts given by plaintiff to defendant recite that the amounts received are in full payment and satisfaction for all services and all claims and in consideration of continuing plaintiff in the employment of defendant he released and discharged and "assigned to the bank all sums due or owing to him from said bank for fees earned as notary public, in the half month preceding."

While it may be unlawful for a public officer to contract to assign his unearned salary, as shown by the large number of cases cited by counsel for complainant, it seems to be established that an assignment of salary or fees after they have been earned is valid. The apparent reason for declaring invalid an assignment of salary yet to be earned is that such contract tends to impair the efficiency of the officer; after the services have been rendered and the salary earned, such a reason no longer exists and assignments of salary earned are enforced. 5 C. J., page 866; Stewart v. Sample, 53 So. 183, 168 Ala. 270.

In the Mussing case, supra, we also held that even if the original contract of employment was invalid, where both parties are in equal fault, courts will not grant any relief. This principle applies here for the reasons stated in that opinion.

The facts and claims in the Mussing case are substantially parallel to those now before us. What we there said is still the opinion of this court and will control our conclusion in the present case.

To which with approval Jones v. State of Indiana, 77 Ind. 548, was cited in Hurt v. Jones, and Thomas Jefferson Jones v. Commonwealth, 123 Ky. 644.

In that case we considered the case of Jackson v. State, decided in an analogous. In the instant case (Ind) it is therefore analogous to the bank. The Supreme Court judgments given by Justice Hitt in Jackson v. State that the accused received was in full payment and satisfaction for all services and all claims and the guarantee of continuing security in the employment of the trustees and treasurer and "entitled to the benefit of the law" if they did not fulfill their duty in paying the bill, in the bank account.

While it may be argued that a public officer or any person is making this statement solely, as given by the State Senator of Jones stated by counsel for respondent, it seems to be beside the point that an employment of money or funds other than those entrusted to voting. The plaintiff's counsel for defendant should be employed of money yet to be earned is that such instrument tends to impair the efficiency of the officer where the services have been rendered and the money earned, that a person in charge of life and employment of money without for consideration. 7 N. E. 3, State ex Jones v. Jones, 81 Ind. 548, 549 (1881).

In the Supreme Court, Jones, we also find that they of the original commission or employment was invalid, since this action was in equal fault, answer will not grant any relief. This principle applies here for the payment stated in the opinion.

The Jones and claims in the complaint show the defendant finally realized to show their intent was. That we think not if the opinion of this court has not still contrary our conclusion in the present case.

The decree of the Chancellor dismissing the bill for want of equity is affirmed.

AFFIRMED.

Dever, P. J., and Hatchett, J., concur.

265 - 26439

MAUD GRAY,
Appellee,

vs.

CASE & MARTIN CO., a Corporation,
Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

224 I.A. 645

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

December 23, 1918, plaintiff was struck and injured by an auto truck belonging to defendant. She brought suit for damages and upon trial had a verdict and judgment for $3500. Defendant has appealed.

The two occurrence witnesses testifying were the plaintiff and the driver of the truck. With due regard to their somewhat variant stories the jury could properly believe that on the morning in question plaintiff was walking east on the south side of Seventy-sixth street, an east and west street in Chicago, towards the southeast corner of its intersection with Vincennes avenue, which runs north and south. Her purpose was to board a northbound street car on Vincennes which had stopped at that corner for passengers. She walked in front and north of the street car and turned towards the south, walking between it and the east curb alongside of the street car, to reach the rear entrance door. At this time the auto truck came from the south suddenly and attempted to pass between the east curb and the street car and ran into plaintiff, inflicting the injuries in question. There was introduced in evidence an ordinance of the City of Chicago declaring it unlawful for any person driving a vehicle upon the streets of Chicago, upon overtaking any street car which is stopped for the purpose of taking on a passenger or passengers, to permit or cause said vehicle to pass or approach

within ten feet of said car as long as it is stopped or remains standing for the purpose of discharging or taking on a passenger or passengers.

This is the all too familiar case of an automobile attempting to pass between the sidewalk and a standing street car which passengers are boarding. The jury properly found the defendant guilty of the negligence charged in the declaration.

Plaintiff was not guilty of contributory negligence. She was naturally hurrying alongside the street car for the purpose of boarding it and had no reason to anticipate that defendant's automobile would suddenly drive into her in unlawfully attempting to pass the street car.

Complaint is made of the rulings of the court upon the admissibility of evidence and upon instructions, but we find nothing of sufficient importance to require a reversal.

It is said that the damages are excessive. She suffered a large contusion covering the greater part of the left side, also bruises over the pubic bone; swelling of the legs followed and apparently a hemorrhage of the tissue. At the time of the trial there still remained a large roll of tissue extending from the front to the back of the left thigh, which the doctor said was probably fibrous tissue left over from the injury. She was confined to her house for two or three months following the injury and received treatment from physicians. There was evidence indicating that her injuries were of a permanent nature and affected her working ability. At the time of the accident she was employed as a waitress and there was considerable evidence that since the injury she was unable to work without pain and could work for fewer hours a day than before the accident. The record does not justify a conclusion that the

vitably the fact of such our so long as it is proper or reasonable standing for the purpose of distributing or taking by a passenger or passengers.

This is the all the Tribunal find of no importance in attempting to pass between the claimants and a charging street car which necessitate our bounding. The jury properly found the defendant guilty of the negligence charged in the declaration.

Plaintiff was not guilty of contributory negligence. She was actually burrying alongside the vehicle and for the purpose of boarding it and had no reason to anticipate that defendant's automobile would suddenly drive into her in sufficiently sufficient to pass the street car.

Complaint is made of the refusal of the court upon the admissibility of evidence and upon instructions, but on the whole of undisputed importance is majority a question.

It is said that the damages are excessive. The evidence a large evidence showing the previous work of the girl, also, broken over the pelvic bone; swelling of the face bruises and generally a lacerations of the tissue. In the view of the trial court still remained a large pail of blood matrix from the canal in the bone of the left thigh, which the surgeon said was probably fifteen years from the injury. She was visited in her home for ten or three months relieving the labor and received treatment from physicians. There was evidence indicating that her injuries are of a permanent nature and affected her working capacity as the time of the accident she was employed as a waitress and there was considerable evidence that since the injury she was unable to work without pain and could work for fewer hours a day than before the accident. The jury did not justify a conclusion that the

verdict is excessive.

We see no sufficient reason to reverse, and the judgment is affirmed.

AFFIRMED.

Dever, P. J., and Hatchett, J., concur.

306 - 26480

MARQUETTE CONSTRUCTION COMPANY, a Corporation, Appellee, vs. JOHN A. CONNELLY, Doing Business as Thomas Connelly, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

224 I.A. 646

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Municipal court entered upon a motion to correct the record in the above cause.

June 5, 1914, plaintiff brought a suit against defendant. June 15th default and judgment were entered for his failure to appear. Subsequently defendant by leave filed a petition to vacate this default and judgment, and plaintiff was ordered to file an answer, which was done. September 23, 1915, the case was placed upon the regular trial call and when called no one appearing, the suit was dismissed for want of prosecution. It next appears that February 13, 1920, a motion was made by plaintiff to set for hearing the petition of defendant to vacate the default and judgment, and plaintiff's answer thereto, and hearing was set for February 20, 1920. The next order appears May 7, 1920, when plaintiff moved the court to correct the record in this cause, which motion was set for May 11th, and on this latter date the order was entered which is the subject of this appeal. By this, the court, after referring to the record, ordered

> "that the record of said order entered herein upon September 23, 1915, be and the same is hereby corrected so that it shall show, and it is HEREBY ORDERED to show that said petition of the defendant was dismissed for want of prosecution upon said September 23, 1915, and the clerk of this court is therefore ordered to correct said order accordingly."

The entry of such an order was an error. The court should have set aside the dismissal for want of prosecution and should have set down for hearing the petition to vacate the default judgment which had been set for February 20, 1920, but for some reason that is not apparent had not been acted upon.

Placing the case upon the trial call September 23, 1915, was a ministerial error of the clerk of the court and could properly be corrected by the writ of error coram nobis. Cramer v. Commercial Men's Association, 260 Ill. 516. The dismissal being set aside would leave pending the petition to vacate the default judgment.

The order of the Municipal court is therefore reversed and the cause is remanded with directions to enter an order upon plaintiff's motion setting aside the dismissal order of September 23, 1915. The court should than set for hearing the petition of defendant to vacate the default judgment and the answer of plaintiff thereto and should proceed to dispose of this forthwith.

REVERSED AND REMANDED WITH DIRECTIONS.

Dever, P. J., and Matchett, J., concur.

320 - 26494

MILEY A. GARARD,
Appellant,

vs.

CITY OF CHICAGO, a Municipal Corporation,
Appellee.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

224 I.A. 646

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover damages for personal injuries sustained by reason of defendant's alleged negligence in respect to one of its streets. Before plaintiff had completed his evidence the trial Judge interrupted to indicate that in his opinion plaintiff was not entitled to recover and after considerable argument, instructed the jury to that effect and judgment was entered in favor of defendant, from which plaintiff appeals.

The declaration was that defendant, in violation of its duty to keep streets and highways free from obstruction and sufficiently lighted so as to be reasonably safe for the traveling public, negligently permitted pillars or posts for a viaduct to be and remain in a public street so that plaintiff, while riding in his automobile and in the exercise of due care for his own safety, collided with said pillar. Certain ordinances were pleaded with reference to obstructions in the street and also an ordinance with reference to lighting, and it was alleged that it was defendant's duty to keep the highway free from obstructions and to cause signal lights to be placed thereon so as to render the same reasonably safe for the traveling public, but that defendant had negligently permitted posts and pillars to remain in the middle of the street without signal lights.

The evidence tended to show that Milwaukee avenue is a public street running northwesterly and southeasterly in Chicago; that at a certain point a railroad company had constructed a steel

viaduct over it, which was supported by three steel pillars or posts set in the middle of the street and also by similar sets of pillars on the public sidewalks near the curb line; that said viaduct and pillars were painted black and illuminated at night by three small electric lights in the upper part of the viaduct next to the pillars set on the sidewalk on the north side of the street; that some four hundred feet northwesterly of this viaduct there is another viaduct over Milwaukee avenue of the same type except that it has no supports in the middle of the street; that it is painted white; that upon the night in question plaintiff was driving his automobile southeasterly along Milwaukee avenue at a speed not to exceed twelve or thirteen miles an hour; that he passed under the first viaduct, but because of darkness and rain and the insufficient lights plaintiff was unable to see the pillars set in the middle of the street until the front wheels of the machine were within a very few feet therefrom; that he tried to avoid striking, but failed; that a collision resulted from which plaintiff suffered the injuries for which suit is brought; that the automobile was badly damaged and while it was being taken to the curbstone nearby three other automobiles met with similar accidents at the same place, so that a police officer took a lantern and warned approaching automobile drivers of the danger of colliding with the posts.

The trial court first seemed to be of the opinion that plaintiff could not recover because he was guilty of contributory negligence, saying, "I hold that plaintiff was guilty of contributory negligence. On a dark night it would be the duty of a man coming or going to be very careful in places where he knew he could not see." Obviously plaintiff could not be said to be guilty of contriburoty negligence as a matter of law. Reasonable, fairminded men of ordinary intelligence would differ as to this and it was a question of fact to be submitted to the

jury. It is unnecessary to cite any decisions upon this well established rule.

After an extended colloquy the trial court seemed to have been of the opinion that there was no negligence on the part of the City because the pillars in question were placed there as a part of a system of construction and were necessary for the purpose of keeping the viaduct in place "so it will not fall down," and that defendant "is under no obligation to have that place lighted or to do it."

Undoubtedly the City in the exercise of its judicial functions had the right to authorize the construction of the viaduct and to provide for its support by proper pillars standing in the street, but it does not follow that it is not liable for accidents resulting therefrom. If the plan adopted is such that the street is thereby rendered unsafe and dangerous to persons using the highway, the City is bound to employ reasonable precautions to protect such persons against injury. While the judicial action in the first instance cannot be questioned, the City is bound in the execution of its ministerial duty, reasonably to guard against dangers to persons lawfully using the street who may be exposed to unnecessary and unreasonable danger thereby. As was said in City v. LeClaire, 49 Ill. 476, when a discretionary power is exercised "it must be in such a manner as not to expose others to injury. A corporation, like individuals, is required to exercise its rights and powers, and with such precautions as shall not subject others to injury." In Nevins v. City of Peoria, 41 Ill. 502, it was held that independent of any plan for public improvement which the common counsel might see fit in its wisdom to adopt, it was bound so to control and manage it that injury would not result to individuals. See also 2 Dillon on Municipal Corporations,

sections 749, 842; Tiedman on Municipal Corporations, section 324.

We hold that the questions of whether or not plaintiff was in the exercise of due care for his own safety at the time of the accident and whether or not the defendant was negligent in permitting pillars to be constructed and placed as they were, and whether they were sufficiently lighted so as reasonably to apprise persons using the street of their presence, were all questions which should have been submitted to the jury for determination.

The peremptory instruction to find for defendant was erroneously given and the judgment is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

Dever, P. J., and Matchett, J., concur.

378 - 26522

EMMA M. O'BRIEN,
Appellee,

vs.

THOMAS F. O'BRIEN and
ELIZABETH B. O'BRIEN,
Appellants.

APPEAL FROM CIRCUIT COURT OF
COOK COUNTY.

224 I.A. 646

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendants from a decree entered upon a bill in the nature of a bill of review.

It seems that the case of O'Brien v. O'Brien, No. B. 3754 was on the trial calendar of the Circuit court, but for certain reasons the case was stricken from the trial call with the suggestion that it be put back when the report of the Master in Chancery, to whom the matter had been referred, was filed. Subsequently, apparently through inadvertence, another Judge called the case for trial and it was dismissed for want of prosecution, although none of the attorneys for the party was in court or knew that the case was on call. Subsequently a petition to vacate the order of dismissal was filed, but the court held it had no jurisdiction. Then followed this bill, and upon hearing the Chancellor found that the order of dismissal above referred to was erroneous and occurred by the misprision of the clerk in placing the case a second time on the trial calendar. A decree was entered vacating that order of dismissal and reinstating the case for further proceeding. All the parties concerned have consented to this except the appellants.

Appellee moves that this appeal be dismissed because the order appealed from is not a final order, and we are of the

[illegible]

[illegible]

[illegible]

opinion the point is well taken.

An order or decree is only final and appealable when it terminates the litigation between the parties on the merits of the case, so that when affirmed the court below has only to proceed with the execution or decree. Rosenthal v. Board of Education, 239 Ill. 29. An order merely setting aside a dismissal and reinstating a case for further proceedings is not a final, appealable order. Walker v. Oliver, 63 Ill. 199; Adamski v. Wieczorek, 170 Ill. 373. A case precisely in point is Hogue v. Hogue, 161 Ill. App. 705. Many other cases to the same effect might be cited.

As the decree is not a final order, this appeal is dismissed.

APPEAL DISMISSED.

Dever, P. J., and Matchett, J., concur.

violates the point in this issue.

An order or decree is only final and appealable when it terminates the litigation between the parties on the merits of the case, so that with affirmed the court below has only to proceed with the execution or decree. Bankhead v. Owen et Ulmer, 60 Ala. 111, 114. In other words, writing with a dissenting and concurring in some for further proceedings in that a final, appealable order exists. Ehlers v. Ehlers, 46 Ala. 267; Bankhead v. Bankhead, 240 Ala. 177. A more strikingly the point is Ehlers v. Ehlers, 46 Ala. 267, 268. Some other cases in the same vein which the court cited.

An this decree is not a final order, this appeal is dismissed.

Bryant, C. J., and Simpson, J., concur.

375 - 26549

AETNA INSURANCE COMPANY,
a Corporation,
Appellee,

vs.

MAURICE WOOLMAN & CO.,
a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

224 I.A. 646

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant in an action in forcible detainer.

The abstract filed violates rule 18 of this court in failing to set forth the pleadings in condensed form and in failing to give the judgment. This alone would be sufficient ground to affirm.

We assume that the judgment was against defendant. The points presented concern the sufficiency of a thirty day notice to terminate.

The statute does not specify any particular form for such a notice. It simply provides that in a tenancy by the month the landlord has the right to terminate the tenancy "by 30 days notice in writing," and to maintain an action for forcible detainer or ejectment. In this case the notice was served January 31, 1920, and called upon defendant to vacate "by March 1st, 1920." This action was commenced April 14th. Defendant contends that this notice is only a twenty-nine day notice. February of that year was leap year and contained twenty-nine days. The Statute on Notices, chapter 100, section 6, provides that in computing time for which any notice is to be given, the first day should be excluded and the last included. Excluding January 31st and counting the twenty-nine days in February and the first day of March, we have thirty days,

[illegible] - 3.8.60

[illegible] Investment Company,
& Mercantile,
Appellant,

vs.

[illegible] Brewing & Co.,
& Commercial,
Respondent.

22414.816

[illegible] Appeals from judgment [illegible]

This is an appeal by defendant [illegible] the judgment below.

The material facts relating [illegible] are as follows: [illegible] filing in and fixed the liability in question [illegible] by plaintiff. This claim [illegible] in the [illegible] filed.

It appears that the [illegible] was entirely [illegible]. The points presented involve the sufficiency of a filing [illegible] statutes.

The statute [illegible] a mortgage [illegible] more a notice. It simply provides that [illegible] the [illegible] the lien of a mortgage [illegible] notice in writing," and be notices or copies [illegible] or electronic. In this case the notice [illegible] and sealed upon defendant in words "[illegible]." This [illegible] was commenced April 1st. Defendant contends that this notice is only a twenty-nine day notice. Commencing at that year [illegible] year and considered twenty-nine days. The [illegible] [illegible] for 30, section 5, provides that in computing time for which any notice is to be given, the first day should be excluded and the last included. Excluding January 1st and counting for twenty-nine days [illegible]

the proper notice under the statute.

Defendant's argument is predicated upon the fallacious assumption that the thirty days must be synchronous with the rental month. We know of no rule which requires this. A notice can be given at any time during the rental month. The protection to the tenant is that no forcible detainer action can be properly commenced until after the expiration of thirty days.

It was not necessary to describe the premises in detail in the body of the notice. It is sufficient to use language which may identify them. The instant notice is addressed to the tenant at the building floor and the street number, and the notice describes the premises as "the space you now occupy." This was sufficient.

There is no merit in defendant's points and the judgment is affirmed.

AFFIRMED.

Dever, P. J., and Matchett, J., concur.

400 - 26574

ANDREW J. LEAF,
Appellee,

vs.

CHARLES BENSON and ANTON BENSON,
Doing Business as BENSON LAND
COMPANY,
Appellants.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

224 I.A. 647

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an undefended appeal from an order of court denying a motion of defendants to vacate a judgment entered against them.

Plaintiff commenced an action in tort, ad damnum $600. Defendants pleaded generally, also statute of limitations. The case was placed on the regular trial call November 7, 1919, and no one appearing was dismissed for want of prosecution. The next day plaintiff, without notice to defendants or their attorneys, made a motion to set aside said dismissal, which was allowed and the case was immediately reinstated for trial and immediately called for trial and tried ex parte and judgment entered against defendants for $750.

Defendants discovering this, entered a motion within thirty days thereafter to vacate said judgment. The motion was supported by affidavit setting up these facts, also that defendants with counsel were present in court November 7th, ready to try said case, and it was dismissed for want of prosecution. Obviously it was error for the court under such circumstances to vacate the order of dismissal without notice to defendants and to proceed to ex parte trial and judgment.

Under such circumstances defendants' motion to vacate the judgment should have been allowed. The order of the trial

court will therefore be reversed and the cause remanded with instructions to allow the motion to vacate the judgment and to set the case for trial forthwith.

REVERSED AND REMANDED WITH DIRECTIONS.

Dever, P. J., and Matchett, J., concur.

421 - 26299

NATHANIEL E. JONES as Trustee Under the Last Will and Testament of Thomas Craven, Deceased, (Substituted in Lieu of the Northern Trust Company as Trustee, etc.,)

Appellee,

vs.

JOHN F. KAHN,

Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

224 I.A. 647

MR. JUSTICE McCUBBIN DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a decree sustaining a Master's report upon an accounting.

The case was originally commenced by Thomas Craven against defendant, John F. Kahn, by a bill seeking an accounting and the right to redeem certain property from a foreclosure sale after the statutory time for redemption had expired. Craven subsequently died and the Northern Trust Company as trustee was substituted as complainant. The Trust Company has since resigned as trustee and Nathaniel E. Jones has been substituted.

An interlocutory decree was entered finding that at defendant's request Craven had executed a power of attorney for him to act as agent for the purpose of collecting rents, making necessary repairs, etc., the surplus, if any, to be applied on account of the indebtedness, if any, of defendant, and that defendant entered into possession thereunder; that an agreement had been made between the parties, whereby complainant should be allowed a reasonable time to redeem after the expiration of time for redemption as fixed by law; that it was defendant's legal duty to account to complainant on demand, but that he failed and neglected so to do. It was ordered that complainant be permitted to redeem within a reasonable time upon payment of the amount due defendant, and that complainant was entitled

to an accounting of all moneys received and paid out by defendant on account of said mortgaged premises. Reference was had to a Master to make the account.

Evidence was taken and the Master filed an account to which defendant made a number of objections, which were overruled. These objections were filed as exceptions before the Chancellor. They were overruled and a decree was entered sustaining the Master's report and decreeing that there was due defendant, Hahn, $3290.30 plus 6 per cent. interest from April 21, 1920, and defendant was ordered to surrender the mortgaged premises to complainant upon the payment of this amount and to make a conveyance and quit claim to complainant of all defendant's interest in the property.

We affirm the decree because of the insufficient character of the objections and exceptions filed by defendant to the Master's report. There are twelve of such objections. A typical objection is as follows: "5. The master, by said report, on page 8, finds that item 9 of complainant's said objections should be sustained and the item disallowed to defendant, whereas the evidence shows said item should be allowed to defendant." Such objections present nothing to the chancellor upon which any opinion could be formed. Such exceptions have been described as "too general, indicate nothing but dissatisfaction with the entire report and furnish no specific grounds as they should have done wherein the defendant has suffered any wrong or as to which of his rights have been disregarded." Story v. Livingston, 13 Peters, 359, quoted with approval in Hiling v. Farrell, 33 Ill. App. 235. This case also quoted from Emerson v. Atwater, 12 Mich. 314, concerning a similar exception: "It points to nothing. It is aimless. It finds fault with the report without giving any reason for it ex-

[illegible]

cept the common one always given by the vanquished party, viz, the decision is wrong and that great injustice has been done to him." And again it was there stated that such exceptions would require the court to embark on a voyage of discovery through many typewritten pages of the record, "without chart or compass, to ascertain whether the Master had made right conclusions of fact from the evidence."

Exceptions to a master's report are in the nature of special demurrers and must state specifically and concisely the findings excepted to. Moffett v. Hanner, 154 Ill. 649; Springer v. Kroschell, 161 Ill. 358.

It is argued by counsel for defendant that the Master should not have taken the amount due by the foreclosure sale and deficiency decree as a basis of the accounting on redemption. This was the proper basis. The trust deed and notes were merged in the foreclosure decree which was satisfied by the sale except as to a small deficiency, which has since been paid. Hanson v. Bethesda Baptist Church, 221 Ill. 216. As Hahn was the complainant in the foreclosure proceeding he cannot now complain of the account stated in the decree which he procured. The present bill does not attack that decree, so it must be considered as a conclusive adjudication between the parties of the amount due and hence must be taken as the basis of the present accounting. This is a redemption from the sale under an extension of the time of redemption pursuant to agreement.

Most of the items in controversy have to do with certain expenditures in the nature of improvements on the premises in question. As noted above, the objections and exceptions to these items simply make the general claim that they should have been allowed to defendant without pointing out their character,

amount, or necessity. The Master found that these changes and alterations were not necessary repairs or improvements. As such findings of fact are not objected to and as no sufficient reasons are presented to us to justify a different opinion, the Chancellor's approval of the report in this respect will not be disturbed.

This is a case for the application of the rule that a mortgagee in possession has no right unless by the consent of the mortgagor, to put new improvements on the property, and he will not be allowed credit for the same unless he can show that they were proper and necessary to keep the premises in good condition, and are rather repairs than improvements. Black on Mortgages, 414, 416. Particularly applicable is the language in Smith v. Sinclair, 8 Gilman, 108:

> "To allow for improvements made under such circumstances would be establishing a principle that would put it in the power of the mortgagee in possession in many instances, even after suit brought, to defeat the redemption altogether, by making improvements that the party entitled to redeem could never pay for. The law will not allow one person to make another his debtor in this way."

Defendant was not entitled to commissions for collecting rents. A mortgagee cannot charge for his time in handling property and collecting rents. 27 Cyc. 1846. Neither is he entitled to compensation as agent. The power of attorney under which he acted made no provision for compensation, but gave him the same rights which he had as mortgagee. Furthermore he was found to have violated his agreement and obligations to complainant, and under such circumstances will be denied compensation. 2 Corpus Juris, 692.

The decree properly taxed all costs against defendant for the reason that where the mortgagee by his misconduct makes the expense necessary, he should be charged with the costs. Sanders v. Peck, 131 Ill. 407.

It has not been made to appear that the decree was improperly entered, and it will therefore be affirmed.

AFFIRMED.

Dwyer, P. J., and Hatchett, J., concur.

443 - 26617

THE PEOPLE OF THE STATE OF ILLINOIS ex rel. Loretta Blair, Appellee,

vs.

PHILIP FRANKLIN, Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

224 I.A. 647

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is a case brought under the Bastardy Act tried by the court. Defendant denied the paternity of the child, but he was found guilty and adjudged to pay relatrix $1100 in installments for the support, maintenance and education of the child.

Plaintiff testified to repeated sexual relations with defendant during the latter half of the year 1918, which are admitted by him. The parties then separated for a time, but plaintiff says they met again in August, 1919, when intercourse with defendant took place. Her child was born about nine months thereafter. This latter occurrence is denied by defendant.

It is argued here that the finding of the court was contrary of the weight of the evidence. The record would not justify us in so holding. The trial court was better able than are we to pass upon the credibility of the witnesses and we shall not disturb the finding.

There was some irregularity in the order of taking testimony, but as the case was tried by the court there was no prejudicial error in this.

From the competent evidence in the record the court could properly find defendant guilty, and the judgment is affirmed.

AFFIRMED.

Dever, P. J., and Matchett, J., concur.

26723

73 - 26723

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

PETER SALERNO,
Plaintiff in Error.

ERROR TO
CRIMINAL COURT,
COOK COUNTY.

224 I.A. 647

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, indicted with others, upon trial by the court, was found guilty of receiving stolen property and sentenced to imprisonment for one year in the House of Correction and fined $500. He asks for a reversal.

It is contended that defendant was not identified as the party receiving the stolen property. We hold that identification was sufficiently proven. The witness, Pankowitz, testified that he, with a man named Bulger, stole the goods in question and took them away in an automobile and unloaded them at defendant's place of business. He was then asked if he knew the defendant, Peter Salerno, and answered that he did and that he had first met him when the man Bulger took the witness with the goods to defendant's store, which was about two hours after the goods were stolen.

It is said that the witness was confused between defendant Peter Salerno, and his brother Dominick. Both these men were present at the trial and the witness was asked to identify the defendant, and he did so by indicating. The record does not say which man he indicated but there is no claim that it was not the defendant.

Considerable complaint is made of alleged bias or prejudice on the part of the trial judge, who, upon the trial of another case had to determine the identity of Peter Salerno

and his brother Dominick; the judge said that he did not want the confusion between them, which then arose, to occur in the instant case. We do not think this would indicate any bias on the part of the court; the judge merely recalled a former experience as justifying his attempt to avoid any mistake.

As the case was tried by the court without the help of a jury, such remarks as were made cannot be considered prejudicial.

We do not find any improper evidence admitted which could have been harmful to defendant.

It is said that there was a fatal variance between the name of the party whose goods were taken, as it appears in the indictment, "Morris Goldschmidt and Company, Incorporated, a corporation," while the evidence shows that the name is Morris Goldschmidt and Company, a corporation. This is not a variance; the word "incorporated" in the indictment was superfluous; it is the same as the word "corporation." If defendant thought this was a variance it should have been pointed out upon the trial. People v. Melnick, 274 Ill. 616. The corporate name was sufficiently proven and its officers were given and there was sufficient evidence that it was a legally organized corporation. People v. Burger, 259 Ill. 284.

We think the evidence justified the finding of the court. The goods were stolen and taken to defendant's place of business; there was evidence that he there paid the thieves money for the goods. The court saw the witnesses and was better able to judge of their credibility than are we. The record justified the finding and as there were no prejudicial errors upon the trial, the judgment is affirmed.

AFFIRMED.

Dever, P. J., and Matchett, J., concur.

was all another something; the judge will have to do all not weigh the confusion between them, which does cause, to arrive in the instant case. To in not think this would indicate any also on the part of the court; the judge merely resulted a former experience as justifying his attempt to avoid any mistake.

As the case was tried by the social client in half as a jury, such consider is more much cannot be reasonably prejudicial.

We to not find any improper evidence admitted which made more than harmless the verdicts.

It is said that there was a fatal variance between the name of the party whose goods were taken, as it appears in the indictment, "Harris Bailenbach and Company, Incorporated, a corporation," while the evidence shows also the name in simple "Bailenbach and Company, a corporation." This is not a variance; the term "Incorporated" is not material nor necessary; it is the same as the word "Corporation." If defendant thought this was a variance it should have pointed out wherein the error. Texas v. Smith, 171 Ill. 628. The corporate name was sufficiently proven and its existence was given and there was sufficient evidence that it was a legally organized corporation. Texas v. Brown, 177 Ill. 154.

We claim the evidence justified the finding of the court. The court was asking our terms in defendant's place of business when was evidence that he knew that the laborer moved for the goods. The jury saw the witnesses and was better able to judge of their credibility than we do. Our review justifies the finding and in these ways no prejudicial error was the trial, the judgment is affirmed.

AFFIRMED.

James, P. J., and Barnard, J., concur.

115 - 26772

LOUIS J. MAYER,
Appellant,

vs.

BOHUMIL FRONEK,
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff entered judgment by confession on a note for $150 signed by defendant to the order of plaintiff. Defendant moved to vacate and set this aside, which was allowed, and he was given leave to defend. On the trial the court found for defendant and judgment was entered accordingly, from which plaintiff appeals.

Plaintiff is a real estate broker, and the note in question was executed by defendant upon the same day that a contract with reference to the exchange of properties was executed by defendant and another person. The note represented the commission and was to be paid when the exchange of properties was consummated pursuant to the contract. The other party to the contract defaulted and the exchange was not made.

Pursuant to the contract, each party executed notes of $300 each, as liquidated damages to be paid by the party who failed to carry out the contract. These notes were given to plaintiff. It does not appear that defendant's note has been returned to him.

Such a contract has been construed to be merely an option contract and not a contract whose specific performance can be compelled. Davis v. Isenstein, 257 Ill. 260. It has also been held that a broker is not entitled to commissions who merely procures an option contract and no sale takes place. Lawrence v. Rhodes, 188 Ill. 96.

These cases support the judgment of the trial court and it is affirmed.

AFFIRMED.

Dever, P. J., and Matchett, J., concur.

133 - 26791

OTTO E. SCHMIDT,
Appellee,

vs.

IRVING PARK DISTRICT,
a corporation,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

224 I.A. 648

MR. JUSTICE McCURDY DELIVERED THE OPINION OF THE COURT.

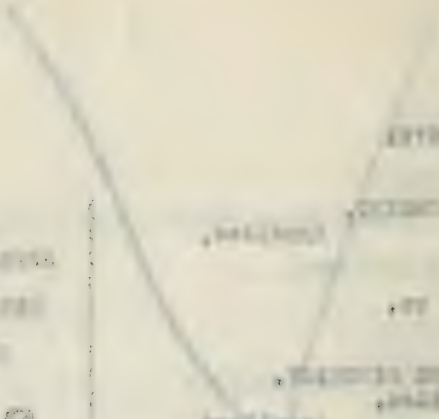
The defendant brings this appeal to reverse a judgment against it on the verdict of a jury for $915.

Failure of both counsel to observe rule 19 of this court with reference to the form of the brief has made it difficult for us to obtain a definite impression of the salient points involved. We refer especially to the provision (third) that where a case depends upon the evidence, the leading facts should be first stated "without discussion or argument and without detail."

Plaintiff was employed as physical director by defendant and we understand that he seeks to recover compensation made up of two items, (1) extra services rendered as superintendent of the Park District of defendant for a six months period commencing November 1, 1916, and ending April 30, 1917; and (2), he was discharged from employment on April 3, 1918, and he claims to be entitled to his salary of $150 a month as physical director for April and May of that year on the ground that his employment was for the year expiring June 1, 1918.

Without commenting upon all the points made, we hold that this judgment cannot stand and that the cause must be reversed for these reasons.

Plaintiff was not entitled to receive compensation for the months of April and May, 1918, but was entitled to



receive compensation only to the date of his discharge. By rule adopted June 6, 1916, which was in force at the time that plaintiff was first employed, it was declared that upon the dismissal of any employe he shall be entitled to his salary to the date of his dismissal only and that all employes accepting positions do so subject to said rule. Further, on March 20, 1916, the commissioners by ordinance provided that after June 1, 1916, no employe should be engaged by the year, but that all employes should hold their positions at the will of the Board, and that all who were appointed for terms of one year should cease to be on that basis after June 1, 1916, and the tenure of their employment should be at the will of the Board. Plaintiff must be held to have contracted with reference to this by law and ordinance and it was error to permit the jury under instructions to award plaintiff compensation for time after the date of his discharge.

As to the so-called extra services as superintendent during the six-months period when there was no regular superintendent, if the evidence showed an employment of plaintiff by the Board or its president and showed also that plaintiff did the work of an acting superintendent and that such services were accepted by the Board, then the defendant would be bound to pay for the same, either the price agreed upon or in the absence of such an agreement, what they were reasonably worth. It is of weight in this connection to note that plaintiff first claimed $50 a month, or $300 for the entire period of his alleged extra services. There is abundant authority to support the proposition that where a contract of employment is made within the general scope of the power to employ, the obligation arising therefrom is not <u>ultra vires</u>. The municipality will be liable for the value of services rendered and accepted under such contract. Among such cases are <u>Chicago v. P. C. C. & St. L. Ry. Co.</u>, 244 Ill. 220; <u>McGovern v. City.</u>

281 Ill. 283; Badger v. Inlet Drainage District, 141 Ill. 540; Holmes v. City, 203 Ill. App. 445; Village of Harvey v. Wilson, 78 Ill. App. 544; National Meter Co. v. Bellwood, 192 Ill. App. 424; City of Taylorville v. Hogan, 130 Ill. App. 70.

May v. City, 222 Ill. 595, is not in conflict with these decisions, for the question there was the payment of an extra compensation for extra work which work the employes were obligated to do for the salary which had been fixed. The case at bar is one where plaintiff alleges that pursuant to an agreement, he performed services in another office or position than his own.

There is a suggestion that the jury allowed plaintiff only his claim for services as superintendent, plus his compensation for three days in April, 1918, as physical director. It cannot be said with any certainty that this was the basis of the verdict. The jury was improperly allowed to bring in compensation for the time after plaintiff's discharge. In view of plaintiff's claim of $300 for extra pay when first presented to the Board, it seems hardly probable that the jury awarded him $900 for this.

The judgment must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Dever, P. J., and Matchett, J., concur.

663 111, 666. Jordan v. Indian Industrial Training, 140 111, 666; Eastman v. Plato, 164 Ill. 100, 406; Illinois ex Rel. v. Chicago, 74 Ill. 223, 244; Southern Railway Co. v. Sherrod, 164 Ill. 223, 229; City of Fairbury v. Thomas, 160 Ill. 180, 78.

Case v. Cline, 200 Ill. 188, is now in conflict with these decisions, for the question there was not raised by an entire compensation for entire work which the employer was obligated to do for the money which he was paid. The case at bar is one where plaintiff alleges that performance, be performed services in another office or articles like his own.

There is a conversion when the jury claimed plaintiff only has claim for services - conversion, that his compensation for those days in April, 1922, is unpaid thereon. It remains to deal with any contention that this was the fault of the vendor. The jury was apparently allowed to plead in mitigation for the time after plaintiff's discharge. In view of plaintiff's claim of $200 for extra pay when first hired by the Co. and, if proper damage provision that the jury awarded him $50 for this.

The judgment must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Jones, P. J., and Vandeveer, J., concur.

148 - 26807

PATRICK GASKIN and ANNA GASKIN, Appellees, vs. J. E. BERRY and C. W. MULLENIX, Appellants.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendants ask the reversal of a judgment for $500 against them, had by plaintiffs in an action based upon a claim of fraud and deceit, tried by the court.

Defendants are real estate brokers and the alleged fraud and deceit relates to a representation said to have been made by defendant, Berry, as to the width of a lot.

The evidence shows that one D. C. Caldwell was the owner of premises number 7637 South Sangamon street, improved with a dwelling house; that defendants were his agents; that on the evening of April 29, 1920, plaintiffs with two sons went with defendant Berry, to examine the property with a view of purchasing the same. Plaintiffs with their sons examined the house and lot. It was about 8 o'clock in the evening; plaintiffs testified that they asked Berry the width of the lot and thereupon he paced it off before them and said that it was thirty-seven feet wide. Caldwell the owner, and his wife, a witness named Zimmerman and defendant Berry, all of whom were present at the time, denied categorically that defendant Berry either paced off the lot or gave any statement as to its width. Witness Caldwell says he told plaintiffs at different times that evening that the lot was thirty-two feet wide, that he also heard his wife, Margaret Caldwell, tell Mrs. Gaskin the lot was thirty-two

wide. The witness Zimmerman also testified that he heard Mrs. Caldwell tell this to Mrs. Gaskin, and defendant Berry testified that Mr. and Mrs. Caldwell told the intending purchasers the lot was thirty-two feet by 125 feet; defendant also testified that he knew this was the width of the lot, as he had made sales in that block. All the parties agreed that a contract in writing for the purchase of the lot was presented and signed by plaintiffs and D. C. Caldwell and his wife, and $500 was deposited by plaintiffs as earnest money and held by defendant Berry. The contract is in the record and clearly describes the property as the north thirty-two feet of lot twenty-one, etc. Plaintiffs testified that this description was not in the contract when it was signed by them whereas the other parties present at the same time testified it was and that the contract exhibited upon the trial was in the same condition as when it was executed by the parties. Sometime in the following June plaintiffs notified Caldwell, the owner, that they did not wish to carry out the contract and there was evidence of a statement made by Mrs. Gaskin indicating regret that they had contracted for this property as they had found another piece they liked just as well, which could be bought for a less amount.

Taking the story of the plaintiffs and their witness as true would not make defendants liable for fraud and deceit. Even if Berry did attempt to give the width of the lot after pacing it this could be only an approximate estimate. The parties were dealing at arm's length and plaintiffs or their sons could have made their own estimate as to the width of the lot by pacing it or some other impromptu expedient. Stepping off a distance for the purpose of making an approximate estimate is done frequently, but an estimate based upon such a crude method of measurement, when done in the presence of others, could not be

[illegible]. The defence introduced also testimony that in Jacob [illegible], Cockerill left this to Mr. Bradley, and personally Barry insisted that Mr. and Mrs. Cockerill told the interpleader [illegible] the lot was delivered [illegible] by Bill Ford; [illegible] also insisted that he knew that was the wife of the lot, as he had made notes in that behalf. All the parties agree that a contract in writing for the purchase of the lot was produced and signed by plaintiffs and C. C. Cockerill and his wife, and that the deposited by plaintiffs as earnest money and held by interpleader Barry. The contract is in the record and clearly describes the property as the north thirty-ten feet of lot twenty-one, etc. Plaintiffs testified that into negotiations was had in the [illegible] when it was signed by them therein the other parties warrant it the same was lawfully in and that the contract activities upon the trial and in the final conclusion in which it was executed by the parties. Therefore in the interpleader the plaintiffs entitled Cockerill, the owner, that they did not wish to carry out the contract and there was evidence of a disagreement with by Mrs. Davis Cockerill regards that they had authorized the [illegible] strongly on their hand amount where they [illegible] to [illegible] which could be taken for a time account.

Taking the story of the plaintiffs and their witnesses as true, would not make actionable libels for fraud and deceit. Since Mr Barry did attempt to give the wife of the lot after [illegible] it this would be only in [illegible] slander. The [illegible] were dealing at arm's length and plaintiffs or their [illegible] have their own [illegible] to do with it the lot by [illegible] in or some other improper [illegible]. [illegible] for the purpose of making an [illegible] in view [illegible], but no actionable [illegible] - [illegible] of

considered as a representation to them of the exact measurement.

We hold it was shown by the preponderance of the evidence that plaintiffs were informed at the time that the lot was thirty-two feet wide and that they executed the written contract describing the premises as having this width.

The judgment of the trial court was not only against the weight of the evidence but the preponderance was in favor of defendants. The judgment is therefore reversed and as there can be no recovery judgment of nil capiat is entered in this court.

REVERSED AND JUDGMENT OF NIL CAPIAT.

Dever, P. J., and Matchett, J., concur

197 - 26857

CARSTENS PACKING COMPANY,
Appellee,

vs.

ARTHUR M. ADLER and GLENN EVANS,
co-partners doing business under
the firm name and style of
Arthur M. Adler & Co.,
Appellants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

224 I.A. 348

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff bringing suit for the balance claimed to be due for goods sold and delivered, upon trial by a jury had a verdict for $326.62, upon which judgment was entered from which defendants appeal.

The controversy arises out of a shipment of 1,200 tierces of tallow from the plaintiff in Tacoma, Washington, to the defendants in Chicago, under a written memorandum calling for delivery "f.o.b. Tacoma, Wash." Defendants claim that when the tallow reached them in Chicago they had it weighed and found a shortage of 3,300 pounds between the Chicago weight and the Tacoma weight. They remitted on account of the sale but deducted $362 to cover this alleged shortage, with one-half the cost of weighing. This suit was to recover this amount withheld.

Evidence was given on behalf of plaintiff that the gross weight of the tallow in Tacoma was 548,844 pounds, deducting the tare weight of the tierces left a net weight there of 465,383 pounds.

The sale was f.o.b. Tacoma, and the law is that delivery on board there was delivery to the purchaser who must sustain any loss in weight sustained thereafter. Defendant, however, questions the proof as to the weight when loaded in

Tacoma, on the ground that the witness testifying thereto, stated that he personally only weighed the gross weight, that is, after the tierces had been filled; that he took the tare weight from the markings on the tierces but these were made by the foreman of the tallow department who does not testify. It may be conceded that this does not meet the strict requirements of proof as to the weight of the empty tierces, but there was sufficient other evidence from which the jury properly could conclude that the testimony of the witness as to the net weight at Tacoma was correct.

Defendant testified that there was an under weight in Chicago of 3,300 pounds; there was testimony that in shipments of tallow between Tacoma, Washington, and Chicago, at the time of year at which this shipment took place, April, there would be a natural shrinkage. A witness was asked if the shortage of 3,300 pounds would be a reasonable shrinkage in a shipment of 465,383 pounds in April between these points, and he answered that it would be about normal. The jury, accepting defendants' statement as to the amount of shortage and also this testimony that such amount was normal shrinkage in 465,383 pounds, had sufficient evidence from which to conclude that the net weight at Tacoma was as stated and claimed by plaintiff.

A suggestion is made of accord and satisfaction, but this was neither pleaded nor proven.

The judgment was proper and it is affirmed.

AFFIRMED.

Dever, P. J., and Matchett, J., concur.

Tacoma, on the ground that the minister participated therein, claimed that he personally only judged the photo-play, that in, after the sleeves had been filled; that he knew who had been which from the wardrobe in the sleeves the shows were sent by the manager of the Salem department who does not travel. It may be noticed that this does not meet the racing requirements of proof as to the weight of the angry sleeves, for there are multitudes other evidence from which the jury reasonably could conclude that the testimony of the witness is to the full weight it should be accorded.

Defendant believed that there was no other weight to minister of 4,000 pounds; there was testimony that in comparison of taking harmony Tacoma, Washington, not Seattle, at the time of year at which this occurred was very slow, usually there would be a majority minister. A witness was called of the minister of 4,000 pounds would be a reasonable minister in a minister of 10,000 pounds in city between Salem and Tacoma, and he testified that it would be about normal. The jury, according to minister statements as to the amount of attendance and also this minister that each weight was normal attendance in 10,000 pounds, and minister witness from which to conclude that he was which is Tacoma and he which was minister by respondent.

A respondent is also at liberty and avoid-action. We this the judgment plaintiff was entitled.

The judgment was proper and is so affirmed.

Dwyer, P. J., and Hamilton, J., concur.

103 - 26269

S. ROSENBLUM,
Plaintiff in Error,

vs.

CHICAGO CITY RAILWAY COMPANY, CHICAGO RAILWAYS COMPANY, SOUTHERN STREET RAILWAY COMPANY and CALUMET AND SOUTH CHICAGO RAILWAY COMPANY, Corporations, Doing Business as CHICAGO SURFACE LINES,
Defendants in Error.

ERROR TO CIRCUIT COURT OF COOK COUNTY.

224 I.A. 648

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff in error was the plaintiff below, and sued the defendants in error in an action on the case. He filed a declaration consisting of two counts. In the first of these he alleged that on August 13, 1917, he was a passenger on one of defendants' cars, which they negligently and carelessly managed, so that while he was riding and in the exercise of due care he was thrown against divers parts of the car and injured. In the second count he alleged that while the car was being operated in a northerly direction and while he was in the exercise of due care, defendants suddenly, without any warning, caused the car to jerk and jolt severely, by means whereof he was injured. Defendants filed a plea of not guilty. The cause was submitted to a jury upon the evidence as offered by the respective parties, and the jury returned a verdict of not guilty. The court overruling plaintiff's motion for a new trial, entered judgment on the verdict.

Plaintiff insists that the doctrine of res ipsa loquitur is applicable under the facts of the case, and that the burden of proving that the injury to him was not the result of negligence of the defendants was not met, that the prima facie case made was not rebutted, and that therefore on the undisputed facts the defendants are liable.

The testimony produced in plaintiff's behalf tended to show that on the morning of the accident, he became a passenger on one of defendants' northbound cars on State street; that he walked through the car and took his place on the north platform beside the motorman; that he was standing and with his right hand holding onto the rail around the motorman; that the car gave a sudden jerk by which he was thrown through the open door into the car; that this occurred near 16th street; that the car first slacked up, and as it jerked suddenly increased its speed. Plaintiff says he dislocated his arm and lacerated his right knee.

Plaintiff was a practicing physician; his office was then located in a downtown building on State street known as the Columbus Memorial building. He says that upon alighting from the car he was assisted to his office by one Smith, who also testified in the case. Further evidence was given tending to show quite severe injuries, and the witness Smith and another witness, Mrs. Hill, testified to the jerking of the car and that plaintiff fell through the door. The motorman and conductor who were in charge of the car testified that there was no unusual jerking of the car at the time and place in question. The motorman says he knew nothing of any accident at the time in question, but upon reaching the end of their journey at Division and Wells street, and when they were getting ready for the return trip, the conductor told him that a man who got off the car at Washington street had given him his card. He says that the car was in good order; that he had no trouble in starting or stopping it at any time; that there was no unnecessary jerking of the car so far as he knows, and that he heard no commotion on the car between 15th and 18th streets, nor did he know of anyone falling on the floor of the car on that journey.

The conductor, who at the time of the trial was no longer in the employ of the defendants, testified that he did not see any accident of any kind on that trip, and that the first he

knew of any claim of that kind was at Washington street, where a gentleman, accompanied by a colored man, got off slowly and when he got to the street handed the witness his card and said, "Here, conductor, is my card if it will do you any good." "And I said to him, 'Why, what do I want with your card?' and he said, 'Well, I hurt my leg on your car.' I said, 'Well, how did that happen?' He said, 'Well, I got shook up.' He said no more, and he walked over and went in that building on the corner there." This witness also says that there was no unusual jerking of the car. He was not able to identify plaintiff as the party who handed the card to him, but plaintiff himself on further cross-examination identified the card produced as the one given to the conductor at the time in question.

The abstract of the evidence as presented by the plaintiff in error was inadequate, and an additional abstract has been filed by defendant in error. From it we find that there were in the testimony of plaintiff's witnesses improbabilities and contradictions from which the jury might properly conclude that the evidence submitted was unreliable, and we are not able to say that the verdict of the jury is manifestly against the weight of the evidence.

Nor is our conclusion different, assuming that the doctrine of res ipsa loquitur is applicable. That doctrine simply states a rule of evidence, and we do not understand Feldman v. Chicago Rys. Co., 289 Ill. 25, cited by appellant, to hold otherwise. As was said in Sweeny v. Irving, 228 U. S. 233:

> "Res ipsa loquitur means that the facts of the occurrence warrant the inference of negligence; *** that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient."

Plaintiff in error contends that the court erred in giving defendants' instruction No. 9, which was as follows:

"The court instructs you that the burden of proof is not upon the defendants to show that they are not guilty of the specific negligence charged in the declaration or either count thereof, but the burden is upon the plaintiff to prove that the defendants are guilty of such negligence, and also to prove that he, himself, was in the exercise of ordinary care for his own safety, and this rule as to the burden of proof is binding in law and must govern you in deciding this case. You have no right to disregard said rule or adopt any other in lieu thereof, but in considering the evidence and coming to a verdict you should adhere strictly to this rule."

This instruction was approved in C. U. T. Co. v. Mee, 218 Ill. 9.

Plaintiff further contends that it was improper under the facts of this case, and this upon the theory that the doctrine of res ipsa loquitur should be applied. We do not understand that doctrine to change the rule that the burden of proof is always upon the party asserting the affirmative of a proposition. As was said in Donovan v. St. Joseph's Home, 295 Ill., 125:

"The term 'burden of proof' is used with different meanings. In one sense the term expresses the burden of the party who has the affirmative of the issue and must ultimately establish such affirmative, but in another sense the term expresses the duty of a party to offer evidence at any particular stage in order to prevent an adverse judgment; that duty is cast upon the party against whom the decision would be if no further evidence were offered."

Moreover, an instruction requested and given for plaintiff told the jury that the burden of proof was upon the plaintiff, and plaintiff in error is not in a position to complain that the court at the request of the defendant gave an instruction announcing the same principle as plaintiff himself had requested should be announced. Vischer v. N. W. Ry., 256 Ill. 572.

We find no error which would require reversal, and the judgment will be affirmed.

AFFIRMED.

Dever, P. J., and McSurely, J., concur.

122 - 26289

JOSEPH McDONNELL,
Appellant,

vs.

BERNARD BAUMAN and
AMELIA BAUMAN,
Appellees.

APPEAL FROM COUNTY COURT OF
COOK COUNTY.

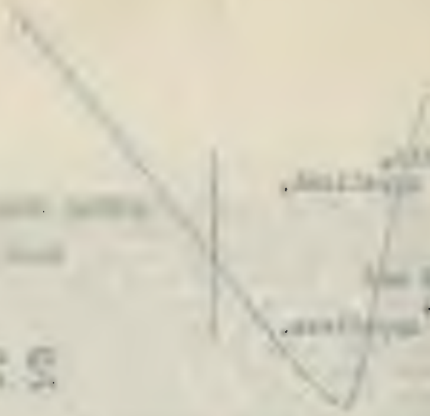
224 I.A. 648

MR. JUSTICE HATCHETT DELIVERED THE OPINION OF THE COURT.

This was an action in assumpsit brought by the plaintiff who is appellant here, against Bernard Bauman, Amelia Bauman and Phillippina Retinger. The action was based on a claim for money said to be due under the terms of a written contract, by reason of the sale by Phillippina Retinger of certain premises of which she was the owner at the time the contract was made, Phillippina Retinger did not sign the contract sued on and the plaintiff dismissed the suit as to her. The cause was tried before a jury, the defendants having filed pleas of non-assumpsit and non-joint liability. At the conclusion of plaintiff's evidence the court instructed the jury to find the issues for the defendants. The verdict was so returned and judgment entered therein against the plaintiff for costs.

The principal question in the case is that raised by the instruction given to the jury, viz, whether there was any evidence in the record under which the jury could reasonably have brought in a verdict in favor of the plaintiff. This we shall consider, although the assignments of error are so indefinite as to make it a close question whether this alleged error argued is presented for review. Berry v. City of Chicago, 192 Ill. 154; Koutnik v. Cody, 148 Ill. App. 313.

The written contract signed by the defendants and plaintiff is in evidence, but it is apparently imperfectly abstracted. It appears therefrom, however, that the contract is in the form of a written proposition to plaintiff, signed "Bernard Bauman, agent



for owner," and "Amelia Bauman," and "accepted, J. McDonnell." The signatures are under seal and the instrument is dated March 7, 1919, at which time the evidence shows it was delivered. By its terms it purports to authorize the plaintiff to sell property described for the price of $24,250, exclusive of commission, $5,000, to be paid in cash and the balance to be secured. It states, "Terms of agreement, 90 days from your acceptance, unless terminated by law or notice from undersigned 30 days prior to expiration of term, etc. In consideration of acceptance without any advance charge, and agreement to devote reasonable efforts, etc., special services and advertising, the undersigned agree to pay a commission of $750, the established rate of the Cook County Real Estate Board on the price above fixed, should the undersigned or owner sell said property during the continuance of this contract (provision for purchase for net price above fixed and upon signing any sale of said property 'we will pay you a sum equal to the excess of said sale price over the price above fixed,' which amount of contract, etc., is accepted as an interest in the subject hereof) McDonnell to pay advertising and expenses; rents, etc., to be prorated, note below to be used only for payment of commission."

Attached to the contract is a blank form of a demand judgment note for $750, which is, however, unsigned. Plaintiff did not produce or attempt to produce any evidence tending to show that he had found a purchaser able and willing to buy the property. Nor have his efforts, which consisted, according to his testimony, in listing the property for sale, advertising it once in the Daily News, telephoning, etc., had anything whatever to do in producing a purchaser of it.

But it is claimed that he is entitled to recover the sum of $750 because, as it is said, the owner, through another

agent, made a sale of the property. The evidence established without controversy that a deal for the sale of this property was closed July 26, 1919, and that the owner thereof at that time delivered to the purchaser a deed of the property dated July 10, 1919. Plaintiff also offered to show that the contract pursuant to which this conveyance was made was executed May 6, 1919. The abstract shows in this respect that there was offered as exhibit 5 the receipt of that date of Henry E. Humphrey to Mr. and Mrs. Thombs (who were grantees in the deed subsequently made) for the sum of $1,000 as part payment on the purchase of the premises in question for $25,000, - $4,000 on delivery of deed in 90 days, etc., balance, etc., mortgage $15,000 5 years at 6 per cent., usual conditions for refund or forfeiture, liquidated damages.

The court refused to receive this exhibit in evidence. The abstract of this exhibit is also imperfect, and we think fails to show that it should have been received in evidence. It did not purport to be a sale but only an agreement, which might in the future ripen into one.

Plaintiff is not suing for a commission claimed to be earned by him. In that case a different case would be presented. But plaintiff relies upon the letter of the contract, and claims the right to recover under it, although he did not produce the purchaser. He says the contract means "This payment was conditional on a sale by the owner in 90 days." But the condition did not take place in 90 days. There was a contract to sell within that time. But plaintiff would not be entitled to payment until and unless there was a completed "sale." There was no "sale" within the meaning of this contract until July 10, 1919, and at that time the term of the contract had expired.

The judgment is affirmed.

AFFIRMED.

Dever, P. J., and McSurely, J., concur.

agent, made a sale of the property. The evidence establishes without controversy that a deed for the sale of this property was placed July 28, 1919, and that the money tendered at that time delivered to the purchaser a deed of the property dated July 28, 1919. Plaintiff also offered to show that the contract pursuant to which this conveyance was made was executed May 1, 1919. The contrary where in this record that there was offered an exhibit A the receipt of that date of Henry W. [illegible] to Dr. and Mrs. Thomas (who were grantees in the deed subsequently made) for the sum of $1,000 as part payment on the purchase of the premises in question for $18,000, - $4,000 on delivery of deed in 30 days, etc., $14,000, etc., payable $10,000 3 years at 6 per cent., terms conditions for refund or forfeiture, liquidated damages.

The trust estate is merely this receipt in evidence. The contract of this exhibit is also important, but we think fails to show that it should have been received in evidence. It did not purport to be a sale but only an agreement, which might in the future ripen into one.

Plaintiff is not asking for a commission claimed to be earned by him. In that case a different case would be presented. But plaintiff relies upon the letter of the contract, and claims the right to recover under it, although he did not produce the purchaser. He says the contract reads "This contract be conditioned on a sale by the owner in 60 days." But the condition did not take place in 60 days. There was a contract to sell within that time, but plaintiff would not be entitled to payment until and not less there was a completed "sale." There can be "sale" within the meaning of this contract until July 28, 1919, and by that time the term of the contract had expired.

The judgment is affirmed.

AFFIRMED.

161 - 26330

GEORGE PAZMAN,
Appellant,

vs.

MICHAEL BRODERICK, JAMES L. CLEARY, JOHN SHEEHAN, P. F. WALSH and JOHN E. McNAMARA,
Appellees.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

224 I.A. 649

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In this case the appellant, who was plaintiff in the trial court, brought suit against the defendants, charging in his declaration that for the purpose of disgracing him on December 22, 1917, without a reasonable or probable cause and without warrant or legal process, defendants arrested him, took him by force from his own premises, caused him to be placed in prison, and falsely charged him with committing the crime of larceny; that on trial before the court he was discharged, and the court found him not guilty and fully acquitted him. Defendants filed a plea of not guilty and certain of them filed a special plea that they were police officers of the City of Chicago; that said crime was committed in their presence; that they were acting under command of their superior officer and with the purest motives; that they believed a crime had been committed and that plaintiff committed it. The issues were tried by jury, which returned a verdict of not guilty. The court overruled plaintiff's motion for a new trial and entered judgment on the verdict.

The material facts are not in dispute. Plaintiff was a native of Hungary, but had lived in this country fourteen years and had become a citizen. His home was at 126 South Lincoln street, where he conducted a store. He owned several pieces of property, one known as No. 4303 Monroe street, and these premises had been

leased by him to an organization known as Lexington Athletic Club. By the terms of the lease rent fell due on the 15th day of each month and was payable in advance. The Club was composed of young men. They furnished the rented room with rugs, piano, pool tables, etc.

On the night of December 21, 1917, plaintiff saw Mr. Summers, the treasurer of the club, for the purpose of collecting the rent due. Mr. Summers told plaintiff that they did not have any money; that the club was about down and out. Plaintiff asked him to get the officers together and see what could be done, as the windows were broken, the basement flooded, and the plumbing frozen and bursting. Mr. Summers replied, "Wait until Monday night." Plaintiff, after trying without success to reach the president of the club, went back to the premises that night and could not find anyone there. He says he noticed at that time what property was there. The doors were locked. He returned the next morning and noticed that the best of the furniture had been removed over night. Plaintiff then consulted an attorney who prepared distress papers for him. He then went back to the club, found no one there on whom he could serve the papers. He then had the furniture which was left removed to a storage house. About 12:30 o'clock of that day the defendant Broderick came to the Club house, and the plaintiff said to him, "They moved out last night. To this Broderick replied, "Is that so?" and left. No one was there then except plaintiff and an employe of the plaintiff putting in some broken glass.

Later defendants Broderick and Walsh came in and Broderick, plaintiff says, called him a vile name. About one o'clock two police officers came and defendant Broderick said to Officer Sheehan, "That's him over there." The officer asked plaintiff who he was. Plaintiff testified, "I said I was the owner and landlord of the house. He said, 'Did you take the stuff away?' I said, 'I

Jammed by this or by an overenthusiastic memory of Christmas pudding club. By the turnout of the house guest fell dim on the 31st Jan of such months not had impaired in memory. The club was composed of young men. Their functions the crowd were rich, rugs, dance, and riches, etc.

On the night of December 31, 1919, visibility was fair, however, the commander of the club, for the purpose of entertaining the good dun. Mr. Thompson held visibility that they did not have any memory that the club was short term and not. Visibility among them to get the military hospitals and was when would an end, as the studies were Tuesday, the Saturday fitness, and the visibility among and hospitals. Mr. Thompson replied, "Not until August eight!" Visibility, after lighting cigarettes, seemed to ponder the prospects of the club, would bear he also questions with right and would not find anyone there. He came he smiled at them that greeting was Tuesday. The house were Tuesday. He explained his have forgotten was assured that the best of the hospitals had been equally true night. Visibility then commenced to interview the physical disorders among the men. He then said to the club, "Good ye you leave ye these he would enjoy the party. He then had the hospitals which was left behind to a dangerous hours. Among fifty visitors or less day the Although Brooklyn came in the first hours, and the visibility that he said, "They spend you last night." In this pandemic mortality, "Is that well and bad." He was also since this causes disability and the origins of the disability pertains to some foreign diseases.

Large deformities exclusive and tough work to our system, which visibility were, with the a fine home. Among the wounded the gallant citizens come and determined hospitals will to diseases Brooklyn. "This's the year round." The military were disability the be was. Physicist beautiful, "I said a was the years was lamented

ordered Hebard to do it.' He asked me what right I had to do it. I told him it was my lawyer's advice, I got distress on the goods for rent they owed me. He wanted to know if I had any court papers to show. I did not have court papers at that time, only papers I wrote myself. He said, 'Did you pay for this stuff?' I said no. He said, 'You are under arrest,' and took me to the patrol wagon standing in front and put me in it, and Walsh, Broderick and the officers got in with me."

Plaintiff was then taken to the police station, put in a cell and afterwards a charge of grand larceny was made against him. He asked leave to telephone his home, which was refused, and he was told that his lawyer could not be reached on the 'phone. At about ten o'clock p. m. he gave bonds and was released, and when the matter came up in court the plaintiff was discharged. When the proceeding in distress came up a judgment was rendered in favor of plaintiff for the amount of the rent claimed by plaintiff to be due him.

The defendants in substance testified that they asked plaintiff if he had any court papers authorizing him to take the furniture, and that he said "No," whereupon the wagon was called and the arrest made. Plaintiff had an unquestioned right under the law to seize the property for rent due. Hurd's Rev. Stat. 1919, chap. 80, sec. 16; Van Wegen v. Grand A. F. O. E., 212 Ill. App. 575. The arrest of plaintiff was absolutely without warrant of law and purely malicious. A wrong of this sort is much more to be regretted when those guilty of the wrong are, as were some of these defendants, officers of the law whose sworn duty it is to uphold it. The jury evidently misapprehended the right of the plaintiff to distrain for rent due, and the trial Judge should have set aside the verdict and granted a new trial.

REVERSED AND REMANDED.

Dever, P.J., and McSurely, J., concur.

endeared myself to do it.' He moved on when right I had to do it. I told him it was my improper opinion, I had directed my the young the very long road on. To months to come if I had any there answer to them. I did not from really people at that time, only answer I young question. He said, 'Tell you why you this matter?' I was so. He said, 'You are under arrest,' and took me to the patrol wagon standing in front and put me in it, and then, somewhat to the astonishment of the men, he said to me,

Plaintiff was then taken to the police station and in a cell and afterwards a clerk of police Doherty was sent again him. He asked them to telephone his father, the mayor, and he was told that his lawyer would not be required at the trial, so about the 'Times' p. 7a. he quite frank and the testimony, and then the matter came up in court the plaintiff was discharged. Then the prosecuting in discharge came up a fortnight was mentioned in regard of plaintiff for the reason of the press defense by plaintiff to be an old.

The defendants in effect have justified that they acted plaintiff if he had not first shown indications the is, also the footsteps, and that he said 'Go,' therefore the whom was called and his arrest made. Plaintiff has no constitutional right make the for to enjoy the property for just one. Where's one. Then, Lord, what, So, see, Lord Lyons v. Lord Lyons, 1 L.R. C.P. 224, 227, 228. The arrest of plaintiff was illegally without warrant or for and grossly malicious. A right of that sort is such more is be dispensed when there really is the serious etc. on this case of these defendants, officers of the law those acting duty. It is to uphold it. The jury evidently disregarded the right of the plaintiff to liberty for just one, and the learned Judge should not put aside the verdict and consider a new trial.

195 - 26368

MANUEL SULTAN,
Appellee,

vs.

HORACE M. SCOTT and
CLARA M. SCOTT,
Appellants.

APPEAL FROM COUNTY COURT OF
COOK COUNTY.

224 I.A. 649

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff, who is appellee here, sued the defendants, who are appellants, and for his declaration in the cause filed the common counts. To this declaration defendants filed a plea of the general issue and the defendant Horace M. Scott pleaded, denying joint liability. The issues were submitted to a jury, which returned a verdict finding for the plaintiff and damages in the sum of $298.37. The motion of defendant for a new trial was overruled and this appeal prayed and allowed from the judgment entered. The errors assigned and argued are, first, that the verdict of the jury was against the weight of the evidence, and second, that under the uncontradicted evidence it was error to enter judgment against Clara M. Scott, one of the defendants.

The claim upon which plaintiff brought action was for a commission alleged to be due to him for the sale of a certain piece of real estate situated near Chicago Heights in Cook County. The defendant Horace M. Scott was called as a witness in plaintiff's behalf and testified that prior to May, 1917, he and his wife, Clara M., were the owners of the tract of land which consisted of about 31 acres; that on or about May 19, 1917, the witness and his wife signed a contract, which is in evidence, and which provided in substance that in consideration of the sum of $155 paid by the plaintiff, they agreed to hold the land until the 1st day of December, 1917, at twelve o'clock noon (time being the essence of the contract) subject to the order of the plaintiff, and to

fer the said real estate at any time within the time limit to plaintiff or such person as he might direct by good and sufficient deed for the price of $400 an acre.

On the same date Horace M. Scott signed, sealed and delivered to plaintiff a writing in and by which he agreed to pay plaintiff the sum of $300 at any time up to December 1, 1917, if the option agreement was consummated. In securing this option plaintiff acted at the request of E. L. Rau, and he transferred all his right, title and interest in the option to Rau, and as a matter of fact the $155 paid to the Scotts was advanced by Rau to plaintiff.

Plaintiff testifies that a few weeks prior to the expiration of the option he was called to Springfield; that he then went to Mr. Scott and informed him that Rau was the party who wished to purchase the property; and he says that previous to that time Mr. Scott had agreed to reduce the price to $375 an acre; that thereafter Mr. Rau and Mr. Scott began to talk directly to each other about the deal, and that in November Mr. Scott told the plaintiff that Rau was trying to get him down to $350 an acre. Plaintiff says that at that time he asked Mr. Scott how that would affect his, plaintiff's, contract, and Scott said if he had to sell for less money plaintiff could not expect him to pay $300, but that if they agreed upon a deal plaintiff would be paid at the rate of 2½ per cent.

Plaintiff further says that about a week or ten days after December 1st he saw Mr. Scott, who said the deal was all settled and that plaintiff would get everything coming to him; that the delay was caused on account of the abstract and a survey required. Plaintiff then told Scott that certain people wished to get the land for cemetery purposes, to stand pat on his price, and Mr. Scott then said the price had been fixed at $350 an acre. On the 4th of December, 1917, defendants executed a writing by which they gave to Rau

an option on the property at the price of $350 an acre. February 9, 1918, defendant Horace M. Scott signed an agreement in writing to pay Rau a commission of $300 on the sale of the property covered by the option.

There is considerable testimony for and against, which we have carefully considered, but we would not be inclined to disturb the verdict of the jury in so far as Horace M. Scott is concerned on the ground that the verdict is against the preponderance of the evidence. On the contrary we think that the jury was justified in believing that the plaintiff had earned and was entitled to a commission in the matter. But the judgment must be reversed for another reason. There is no evidence in the record from which the jury could reasonably find that Mrs. Scott was a party to any oral agreement for the payment of commissions, and the written agreement was never signed by her. There is testimony to the effect that Mr. Scott said he was acting for his wife in the matter, but this would not be binding upon her in the absence of proof of his authority to act for her. This issue was squarely raised by the pleadings, and we think it was error for the court to enter judgment against Clara M. Scott. Coit et al. v. Joyce et al., 61 Ill. 489; Cairo & St. L. R. R. Co. v. Easterly, 80 Ill. 156; Claflin v. Dunne, 129 Ill. 241; Grand Pacific Hotel Co. v. Pinkerton, 217 Ill. 61.

For the reasons indicated the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

Dever, P. J., and McSurely, J., concur.

[illegible]

[illegible]

[illegible]

216 - 26389

CHARLES W. SEDDON,
Appellant,

vs.

E. R. HIBBARD,
Appellee.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

224 I.A. 649

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In this case the plaintiff below is the appellant here. This suit was begun by filing an affidavit for an attachment January 13, 1919. The writ issued and was served on the Grip Nut Co. as garnishee. The declaration filed was the common counts, to which was attached a statement of account in the sum of $5,000, and the affidavit of the plaintiff that the demand was for money due and owing, and that there was due from the defendant to the plaintiff, after allowing offsets, the sum of $5,000 with interest thereon from February 8, 1917. The defendant appeared and filed a plea of the general issue, to which was attached the affidavit of one Klein to the effect that he was the agent, etc., for the defendant and that the defendant had a good defense to the whole of plaintiff's demand, in that the defendant was not indebted, etc.

By leave of court an additional count was filed November 8, 1919, which set up that the plaintiff, being desirous of purchasing from the defendant certain shares of stock, then and there owned by the defendant, on, to-wit, February 8, 1917, for the purpose of paying the purchase price on said shares, made, executed and delivered to the defendant a check for the sum of $5,000, payable to the order of the defendant; that the check was thereafter endorsed by the defendant in blank, and was presented for payment in due course to the bank upon which the check was drawn, and was by it paid out of the funds of the plaintiff. The count set up

the various endorsements on the check, and further alleged that after the making and delivery of the check and after the same was paid, plaintiff requested the defendant to deliver to him the said shares of stock, and that defendant denied that he had sold said shares of stock to the plaintiff or that he had entered into any agreement with the plaintiff for the sale of said stock; that thereupon the plaintiff demanded of the defendant the said sum of $5,000, and the defendant then and there became and was liable to the plaintiff for said amount, and being so liable promised to pay, etc.

Attached to this additional count was the affidavit of the plaintiff that the demand was for the proceeds of a certain check, as set forth in the additional count; that the check was made, executed and delivered to the defendant for the sole purpose of paying the purchase price of certain shares of stock, and in the belief that the defendant would sell said shares of stock for the said sum; that the said check was endorsed by the defendant and presented to the bank upon which it was drawn, and paid out of the funds in its possession belonging to the plaintiff; that after the delivery of the check and payment of it, the defendant denied that he agreed to sell to the plaintiff said shares of stock, or that he had made any agreement with the plaintiff for the sale and purchase of the same, and refused to deliver said stock; that thereupon the plaintiff demanded the return to him of said $5,000, but the defendant refused to pay said sum, and has at all times denied that he was in any manner liable to deliver to said plaintiff said shares of stock, or to return to the plaintiff the said sum of $5,000 and now refuses so to do, etc.

To this additional count the defendant filed a plea of the general issue, attached to which was the affidavit of Klein as agent and attorney for the defendant, to the effect that he had a

good defense to the whole of plaintiff's demand upon the merits; that he denied that the check set forth was delivered to the defendant by the plaintiff for the purpose of paying the purchase price of the shares of stock, or that he ever agreed to sell to the plaintiff any shares of stock or ever did sell such shares to him; that he admitted the check was endorsed by him, but states the fact to be that said check was presented to him by H. H. Hibbard, who requested him to endorse the same; that it was at his request that said check was endorsed by the defendant; that he is informed and believes and states the fact to be that plaintiff made said check payable to defendant by mistake, and that it was the plaintiff's intention to make said check payable to said H. H. Hibbard, and that defendant when he endorsed said check so understood the facts; that consideration for said check moved from H. H. Hibbard to the plaintiff and not from defendant to the plaintiff, and that plaintiff's transactions were with the said H. H. Hibbard and not defendant; that he denied he ever caused said check to be presented to the bank upon which it was drawn, and denied that he received the proceeds of the check or any part of it, but admits that he has at all times denied that he was in any manner liable to deliver to said plaintiff such shares of stock or return to the said plaintiff the said sum of $5,000.

The cause was tried before a jury. At the conclusion of plaintiff's evidence the court, on motion of the defendant, directed a verdict in his favor, overruled plaintiff's motion for a new trial and entered judgment on the verdict. The giving of this instruction is the alleged error relied on. The rule to be applied in such case is well settled. If there is any evidence from which the jury can find reasonably that the

[illegible] in the view of plaintiff's counsel upon the question; when he denied that the stock was fairly worth $100 in the discussion by the plaintiff for the purpose of getting the existing price or the amount of stock, or that he ever agreed to sell to the plaintiff any amount of stock at or near the well known price; that he admitted the stock was unknown by him, but stated the fact to be that said Cook was interested in him by. H. Ellsworth, who recommended him to endorse the note; that he was a late journeyman shoe maker and obtained by the assistance and guidance the fact that it be that plaintiff made such signal progress in distributing lightning, and that if the plaintiff's testimony is true, that some [illegible] he said H. E. Ellsworth, and that defendant was in ignorance and unknown to defendant him further; that conversation for a [illegible] where then H. E. Ellsworth to the plaintiff and not, from defendant to the plaintiff, and that plaintiff's transactions with the said H. E. Ellsworth and not defendant; that he should be more [illegible] said claim to be presented to the Cook [illegible] where, and denied that he received the premium or the stock or any part of it, but admits that he has at all times held that he is by memory [illegible] to believe to sell plaintiff [illegible] of stock to return to the said plaintiff the sum of $1,000.

The money was loaned without a [illegible]. At the trial plaintiff's witness the court, on motion of the defendant, directed a verdict in his favor, plaintiff's [illegible] for a new trial was refused [illegible] on the verdict. The giving of this instruction is the alleged error relied on. The note is in evidence in such form is well [illegible]. It [illegible] to any [illegible] that the jury can find [illegible] that the

material allegations of the declaration or any count thereof have been proved, the case should be submitted to the jury; otherwise an instruction for the defendant is proper. Devine v. Delano, 272 Ill. 166; Art Works v. Picture Frame Works, 264 Ill. 610; Woodman v. Ill. Trust & Savings Bank, 211 Ill. 578.

The evidence submitted in plaintiff's behalf tended to show that he was intimately acquainted with the defendant, E. R. Hibbard; that in February, 1917, he, plaintiff, was residing at Los Angeles, California; that on the evening of the 6th of that month plaintiff took dinner at defendant's home in Los Angeles, where with others defendant's son Howard was present; that defendant at that time stated that he had retired from business and had taken up a gold mine in Arizona to give him something to do; that defendant had never had the opportunity to repay some of his friends who had helped him in business, of whom plaintiff was one; that he now had an opportunity to reciprocate and said, "If you have any money you would like to invest, I would like to have you put it with us." "He said if I had any money to put in with them, he would guarantee me against loss, so that I would have no risk, and he also said that he was firmly of the belief and convinced me that they had a mine that was going to make us independent. I received it as an offer of courtesy from him, and had absolute faith in Mr. Hibbard that he would be as good as his word. Nothing more was said then that he explained about the mine."

The next evening plaintiff says there was a further conversation, at which plaintiff asked defendant, "If I bought stock through Howard, if he was representing him, and he said, 'Absolutely, any deal you make with Howard he is representing me.'" The next day plaintiff says, after a game of golf with Howard, he, plaintiff, made out his check for $5,000 to the order of plaintiff and delivered

it to Howard. This check is in evidence and it appears to have been endorsed by plaintiff and Howard Hibbard and deposited in Howard's account, and upon presentation paid. It was also proved that no one had ever returned to plaintiff the $5,000; that is the last he saw of his money.

Plaintiff introduced the following letter:

"Mr. C. W. Seddon,
Proctor, Minnesota.

Dear Mr. Seddon:

I have a communication from Barnett & Truman of Chicago to the effect that they are going to bring suit against me for recovery of the $5,000 you invested with Howard.

I notified you promptly - the first intimation I had that you considered me in any way liable - that I absolved myself from any and all responsibility in connection with your dealings with Howard. I lost over $100,000 in that deal and took my loss like a man. I never offered to sell you any stock nor did anything to urge you to purchase it and as your dealings were purely with Howard, I refused to accept your check.

Rather than be annoyed with the affair I will send you my personal check for $1,000 or possibly $1,500, for settlement in full. And, if you think this is an evidence of weakness on my part and that you will get more by fighting, I am going to invite you to proceed. I am only making this offer to settle an unfortunate affair where you took your chance and lost your money the same as I did.

As to what you could get out of Howard, I am going to leave to your imagination. I told you at the 'Blackstone' that I would not pay this account - that I did not owe it to you and from all I understand Howard does not either.

Respectfully yours,
H. R. Hibbard."

And the plaintiff also testified that while in California in 1917 he asked defendant when he was going to deliver the stock in the Cyclopic Mining company; that defendant told him that there was no stock issued yet, and it was not his intention to issue stock until the mine had been developed to a certain stage, and that he received a letter from him in which he made practically the same statement in 1918. The following then occurred:

"The court: Let me ask you when you went up there and demanded $5,000 of him, what induced you to demand the $5,000---?
The witness: Because I had placed $5,000 in his hands which he guaranteed me against loss.
The court: Loss of what?
The witness: If I put $5,000 in with them I would take no chance, if the mine did fail I would get the $5,000 back.

The court: Then you are suing him on a guaranty, you ought to change your form of action entirely. Your client doesn't agree with you.
The witness: That is why I asked him.
The court: You asked him for $5,000 because of that?
The witness: He had guaranteed he would give it back to me if the mine went to the bad.
The court: You were to take the profits, but to have no losses?
The witness: That is just exactly what Mr. Hibbard agreed to with me, otherwise I hadn't the $5,000 to gamble on any gold mine.
The court: Without knowing anything about the mine, without having any knowledge of it, its capitalization, its officers, anything as a matter of fact, you put confidence in him?
The witness: Absolutely.
The court: That is the idea, and you thought he was going to cause you to make a lot of money.
The witness: Not only thought it, but he told me so."
Whereupon the defendant rested his case and the instruction to the jury to find the issues for the defendant was given.

In considering whether this evidence should have been submitted to a jury, plaintiff is entitled to have it considered in the light most favorable to him. Leftus v. Chicago Mys. Co., 293 Ill. 475. The plaintiff says it should have been so submitted for three reasons. First, he says, on the theory that one who has paid money to another under a supposed contract is entitled to recover the same back if the contract is denied or repudiated. In support of this contention plaintiff cites Vider v. Ferguson, 83 Ill. App. 136; Mound City Distilling Co. v. Consolidated Adjustment Co., 152 Ill. App. 155, and Laflin v. Howe, 112 Ill. 253.

We do not think any one of these cases is in point. Vider v. Ferguson simply holds that where each party has consented to rescind a contract neither can base a claim on it, and that in such case a vendee can recover back money paid to the vendor. Mound City Distilling Co. v. Consolidated Adjustment Co. is authority for the proposition that if one has received money in payment of his undertaking to perform an act, the other party has the right to treat his refusal to perform the act as a rescission of the contract and bring an action to recover back the price paid. No such case as either of these is here set up by the pleadings or sustained by the evidence. Plaintiff's evidence

does not tend to show a rescission of a contract by mutual act of the parties. On the contrary, plaintiff's story tends to show a denial by defendant that any contract exists between plaintiff and defendant and an affirmation by plaintiff that it does exist.

Plaintiff's evidence does not tend to show a failure to deliver the thing he purchased, namely, an interest in the mine. On the contrary he testified this interest was worthless, and that the defendant had guaranteed him against loss, which guaranty he, defendant, refused to fulfil. His testimony tends to show, if any right of action, one on the contract, not one arising from a rescission of it. Laflin v. Rowe is also not in point. The opinion in that case discusses the general character of indebitatus assumpsit, and holds that under the circumstances of that case the plaintiff could recover the price of a building which plaintiff had purchased and paid for, but to which defendant, the vendee, had no title which he was able to convey. The facts of that case are not similar to the facts here. Plaintiff does not say that he did not get what he contracted for, namely, the interest in the mine. But he says the mine proved to be worthless, and that the defendant had guaranteed him against loss.

Plaintiff contends in the second place that the evidence tends to show a right of action on the theory that plaintiff paid his money under a mistake of fact, and is therefore entitled to recover it back. He says the plaintiff believed at the time of the transaction that he had a contract with defendant, and if he was mistaken in his belief, then this was a mistake of fact, and having paid his money under this belief, on familiar principles he is entitled to sue for and recover it as for money received by defendant to plaintiff's use. This is a novel and ingenious contention. We search the record in vain for any evidence to show that

plaintiff is or was mistaken as to the existence of a contract. On the contrary he testifies most positively to the existence of a contract, and that the contract was made between himself and defendant. True, its terms are stated somewhat vaguely, but that there was a contract, that the contract was made between plaintiff and defendant, and that under its terms defendant was to guarantee plaintiff against loss, are stated without equivocation. The pleading of defendant denies that the contract was with him, but there is no evidence to that effect. The evidence for plaintiff, which we must assume to be true, is to the effect that there was a contract.

These observations make it unnecessary, we think, to consider at length plaintiff's third point, which is that plaintiff is entitled to recover on the theory that one transferring to an innocent holder a negotiable instrument, unenforcible in his own hands, is liable to the maker thereof for the amount which he pays to such holder. We do not question that proposition of law, but there are no facts testified to making it applicable here. In Redding v. Leeney, 208 Ill. App. 433, the court states the rules which preclude recovery by plaintiff on the pleadings and proofs in this case:

> "Plaintiff can prove and recover only what is stated in the affidavit of claim, but he cannot prove and recover even that unless he has an appropriate declaration on that cause of action."

There was no evidence from which the jury could reasonabli find, under the law, that plaintiff was entitled to recover on any theory under the pleadings. The instruction to find for the defendant was therefore properly given, and the judgment is affirmed.

AFFIRMED.

Dever, P. J., and McGurely, J., concur.

235 - 26408

UNITED STATES FIDELITY
AND GUARANTY COMPANY,
Appellee,

vs.

SANDOVAL ZINC COMPANY, a
Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

224 I.A. 649

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The appellant here was the defendant below. It was sued in the Municipal court by the plaintiff, which in its statement of claim as amended alleged that the plaintiff became the surety on a bond for defendant, the bond running to N. Brenner & Co., of Toronto, Canada, whereby it became bound to pay to said N. Brenner & Co. the sum of $600, provided that a grievance committee of the National Association of Waste Material Dealers in an arbitration between said N. Brenner & Co. and defendant, should decide in such arbitration against the defendant; that defendant entered into an agreement with the plaintiff on or about February 28, 1919, whereby said defendant agreed to indemnify and save harmless the plaintiff from any judgment rendered in an action in the County court of the County of York, Province of Ontario, Dominion of Canada, wherein N. Brenner & Co. was plaintiff, and defendant and plaintiff were defendants, in which suit was brought to enforce the arbitration.

The statement further alleges that the defendant here covenanted and agreed in said agreement to save the defendant there harmless and to indemnify it against any judgment which might be entered in said suit, and to pay and keep the plaintiff indemnified against any loss, costs, damages, expenses, counsel fees, etc., which the plaintiff might incur or sustain by reason of having entered into said bond or said agreement, and further, that plaintiff

paid or caused to be paid a judgment in the suit in the sum of $779.36, counsel fees of $44 and a premium on the bond of $10, together with interest on the judgment from September 14, 1912, at the rate of 5 per cent. per annum, besides counsel fees in this suit; that defendant had failed and refused to pay said sums of money which were due and owing to the plaintiff.

To this amended statement of claim defendant filed an amended affidavit of merits, which was sworn to by Leonard Weill, secretary of the corporation. This affidavit states that the affiant is informed and believes that plaintiff did sign a bond running to M. Bremmer & Co., but that no such arbitration was ever in fact held, and no decision against the defendant ever rendered in any such arbitration; that the agreement that the plaintiff sued on was signed by one M. Weill, who was at that time the president of the corporation, and that as such president he had no power, right or authority to sign, execute or deliver the agreement, and that the defendant is not legally bound by his signature.

Further, that for almost a week last past the affiant has made diligent search at the office of the defendant for the books and records, so that he might be able to set forth verbatim the exact language of the by-laws with reference to the powers and duties of the president, in order that the court might determine whether said M. Weill had the authority to sign the agreement or attach the seal of the corporation, but that upon diligent and exhaustive search he has been unable to discover the records which have been mislaid, "but will undoubtedly be found in the near future."

From a prior examination of the records he states the fact to be that there was nothingin the by-laws which authorized, permitted or directed the said M. Weill as president to sign, execute or deliver the agreement referred to, and that the same was not authorized by any resolution or motion passed by the stockholders or

directors of the corporation; further that the agreement is without force and effect because there is no consideration for the same so far as defendant is concerned. Defendant never entered its appearance in any said suit against it in the County court in the County of York; that no service was had upon the defendant in any such suit, and no such suit could be brought or maintained against it; in fact there had never been any arbitration as set forth in the amended statement of claim; that the defendant has not yet received, secured or accepted any benefit of the alleged agreement set forth in the statement of claim, nor received anything of value or consideration from the said agreement or the transaction concerning the same; that defendant did not covenant and agree on the 28th of February, 1919, to save the plaintiff harmless, as alleged in said amended statement of claim, or to indemnify it against any judgment which might be entered in any suit mentioned in said amended statement of claim, and did not agree to pay and keep the plaintiff indemnified against any loss, costs, damages, expenses, counsel fees, etc., which the plaintiff might incur, as set forth in said amended statement of claim.

Further, that plaintiff was not entitled to the sums of money claimed in said amended statement of claim, nor any part thereof, etc.

April 30, 1920, on motion of plaintiff an order was entered striking this amended affidavit of merits from the files. Defendant elected to stand by it, whereupon, on motion of plaintiff, the court proceeded to enter judgment by default for want of an affidavit of merits, and after hearing the evidence assessed plaintiff's damages at the sum of $910.36, and overruling defendant's motion for a new trial and in arrest, entered judgment for that amount, together with costs.

The first error assigned and argued is that the court erred in striking the amended affidavit of merits. This affidavit admitted that defendant signed the bond and that it signed the agreement to indemnify by one M. Weill, who at that time was president of defendant. We think the court did not err in striking this affidavit of merits. The rules of the Municipal court are not preserved in the bill of exceptions. We will therefore presume that the provisions of the Practice act apply. It was therefore necessary that defendant should specify the nature of its defense and should show a substantial defense to the statement of claim. An affidavit of merits which merely states a conclusion of law, as does this one, is not sufficient. As a matter of fact, whatever the provisions of the by-laws might be, the corporation would be estopped under the facts as recited in the affidavit of merits, to deny the authority of the president to execute the bond. United Mutual Life Insurance Co. v. White, 106 Ill., 67; Domestic Building Assoc. v. Guadiano, 195 Ill. 223.

While the affidavit denies the execution of the express agreement to indemnify and the consideration for it, it would appear from the facts set up that such a legal obligation was implied, irrespective of any agreement, and this was sufficient consideration for it when made. Ridgway v. Potter, 114 Ill. 461; Rossiter v. Waterman, 151 Ill. 169.

The defendant had demanded trial by jury when it entered its appearance, and it argues that it was error for the court to assess damages without a jury under the circumstances. The contrary has been held in Weil v. Federal Life Insurance Co., 264 Ill. 425.

The judgment is affirmed.

AFFIRMED.

Dever, P. J., and McBurney, J., concur.

The Court very clearly and emphatically in that the power
given to statutes for special authority of action. This authority
abolition that determined which the best and then it cannot the
assessment in tenancy by the c. entity, who at that also the
creation of determination. It rule the court in not as to exclu-
ing this authority of rights. The below of the statutes that
are not presented in the that of conditions. It will therefore
appear that the provisions of the tenants and entity. It has
therefore necessary that determined should clearly the nature of
the failure and should have a constitutional decision on the question
of claims. An attempt of [illegible] [illegible] a [illegible]
also of law, as this case has, is not [illegible]. In [illegible] of
that, whatever the provisions of the [illegible] might be, in some
cases will be [illegible] [illegible] [illegible] in the [illegible]
failure of [illegible], to deny the authority or the [illegible] to [illegible]
make the [illegible]. [illegible] [illegible] [illegible] v. [illegible], 3d
Tex., 47; [illegible] [illegible] v. [illegible], 47 [illegible], 47.

While the attorneys [illegible] the [illegible] of the [illegible]
[illegible] agreement is [illegible] and the [illegible] [illegible] the [illegible], it
would [illegible] from the [illegible] [illegible] [illegible] [illegible] a [illegible] [illegible]
the [illegible], [illegible] of the [illegible], [illegible] [illegible] the [illegible]
[illegible] for [illegible] [illegible]. [illegible] v. [illegible], [illegible] [illegible]
[illegible] v. [illegible], [illegible] [illegible], 3d.

The [illegible] and [illegible] [illegible] is [illegible] [illegible] [illegible] [illegible]
[illegible] the [illegible], and [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] to [illegible] [illegible] [illegible] a [illegible] [illegible] the [illegible]-
The [illegible] has been [illegible] in [illegible] v. [illegible] [illegible] [illegible] [illegible]
the [illegible], [illegible].

The [illegible] is affirmed.

[illegible].

[illegible], C. J., and [illegible], J., [illegible].

255 - 26428

ASSOCIATED FRUIT CO.,
a Corporation,
Appellant,

vs.

FURRY FRUIT CO.,
a Corporation,
Appellee.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

224 I.A. 649

MR. JUSTICE HATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff below, who is appellant here, began a suit by attachment in the Superior court. It filed an affidavit therefor to the effect that the defendant corporation "is indebted to the said Associated Fruit Co., a corporation, plaintiff, after allowing just credits and set-offs, in the sum of $1603.81, $1503.81 of which represents damage sustained by the plaintiff upon the breach by the Furry Fruit Company of a certain contract of sale of a car of apples on or about September 12, 1919, under which the said Furry Fruit Company failed to furnish the grade of apples agreed upon, and $100 representing deposit on a car ordered of the Furry Fruit Company by plaintiff and not received by said plaintiff."

The ground of attachment was stated to be that the defendant was not a resident of this State. The writ of attachment issued and was levied upon certain property, which was afterwards replevined from the sheriff by the coroner of Cook County.

Plaintiff filed a declaration which alleged that the plaintiff agreed with and contracted with defendant to buy, and defendant agreed with and contracted to sell to the plaintiff a certain quantity of goods, wares and merchandise, to-wit, 281 packages of Jonathan apples, at a price of $2.25 per package, and 443 packages of Jonathan apples at a price of $2 per package;

that the defendant thereby became obligated to furnish to the plaintiff apples of a merchantable quality and fit for human consumption; that as a consideration therefor plaintiff paid to defendant thereafter $1518.25, and also paid as freight the sum of $545.76; that the defendant, regardless of its obligations, delivered the number and quantity of apples, but that said apples were all of an inferior quality and not fit for consumption, and not up to the standard contracted for; that plaintiff thereafter sold the apples at the best price obtainable therefor, to-wit, the sum of $559.67, and the plaintiff thereby, by reason of the failure and neglect of the defendant to perform its obligation, sustained damages in the sum of $1503.21.

To this declaration the plaintiff attached the common counts in the usual form. Defendant entered a special appearance for the purpose of making a motion to quash the writ of attachment on the ground that the writ was void and of no effect, and as ground for said motion alleged, among other things, that it appeared from the affidavit for attachment and the declaration, that the suit was for unliquidated damages.

Upon the hearing, the court having indicated its intention to quash the writ and release the property attached, plaintiff moved the court for leave to file instanter an amended affidavit in which it alleged in substance that defendant "is indebted to the Associated Fruit Co., a corporation, after allowing all just credits and set-offs, in the sum of $1503.21, upon an implied contract for the payment of money received by the defendant for plaintiff's use, and also money paid for defendant's benefit." The court denied plaintiff's motion for leave to file this amended affidavit, and entered an order quashing the writ of attachment and ordering the property attached released, and from this order this appeal was prayed and allowed.

Two questions are presented on the record, first, whether the court erred in holding the first affidavit insufficient, or, second, in refusing to permit the amended affidavit to be filed.

Appellant concedes that a demand for unliquidated damages will not support an original attachment in this State. He contends that this affidavit did not show a demand for unliquidated damages, but that on the contrary the demand was liquidated and certain or capable of being liquidated and made certain by computation or calculation. Unliquidated damages are clearly defined in Butts v. Collins, 13 Wendell 156, where it is said:

> "They are such as rest in opinion only, and must be ascertained by a jury, their verdict being regulated by the peculiar circumstances of each particular case."

And in Steele Medeles Co. v. Rhoades, 153 Ill. App. 576, it is said:

> "No doubt it is true that the damages are liquidated wherever they can be determined from the contract itself, or from the contract and the rules of law applicable thereto."

And in American Laundry Machinery Co. v. Barr, 176 Ill. App. 519, it is said:

> "Or to state the rule otherwise, unliquidated damages are such as are unascertained, as those arising out of torts, as well as those following breaches of contract, where the amount of the damage has not been by agreement determined.

In Lemman & Hamis v. Inter State Produce Co., 205 Ill. App. 270, the opinion states:

> "Damages are said to be liquidated where they can be determined from the contract itself, or from the contract and the rules of law applicable thereto."

Neither by reference to the contract nor by reference to the contract and the rules of law applicable, nor by any process of simple computation, could the damages here be sustained. They were, therefore, unliquidated. See also Highie v. Rust, 211 Ill. 533; Sapes v. Burgess, 138 Ill. 61.

The affidavit of the plaintiff clearly set up a cause of action for damages for breach of warranty of the quality of goods

delivered. In such a case the measure of damages for breach of warranty is the difference between the value of the article actually furnished the buyer and the value the article would have had if possessing the qualities it was warranted to have. Williston on Sales, sec. 613, p. 1618; Moore Furniture Co. v. Sloane, 166 Ill. 487. Now we think it is clear under the facts as set up in the affidavit and special count of the declaration, that in the last analysis the damages recoverable would rest in opinion only. In the first place, it would be necessary for the plaintiff to show the quality of the goods, which by the terms of the contract were to have been delivered; and in this connection, to sustain its case, it would be necessary to show in what respects the goods delivered were inferior to the goods contracted for. In the next place it would be necessary for the plaintiff to show the market price of the goods contracted for, and also the market price of the goods actually delivered. Sales are admissible in evidence for the purpose of showing the market price of a given article, but these, in the nature of things, are not and cannot be conclusive. In the last analysis the proof on these material matters would necessarily rest upon the opinions of witnesses. This would also be true although the rejection and resale of the apples by appellant were, under the provisions of sections 53, 60 and 69 of the Uniform Sales Act, Hurd's Rev. Stat. of Illinois, 1919, chap. 121a.

Appellant says there is a clear distinction between the instant case and such cases as Mighie v. Rust, supra, Lawson v. Inter State Produce Co., supra, and other cases relied upon by appellee, in that commodities involved in these cases had no standard market value. That distinction has been sometimes recognized in determining whether interest should be allowed as a part of the damages recovered. Van Rensselaer v. Jewett, 2 N. Y. 135;

[illegible]

[illegible]

[illegible]

McMahon v. N. Y. & E. R. Co., 20 N. Y. 465, but the opinions in these cases show that although interest was allowed as a part of the damages, it was not on the theory that the damages were liquidated, but rather that the court took the view that this was one class of unliquidated damages on which interest would be allowed.

We think, then, that so far as the first affidavit is concerned, the cause of action which it disclosed is one for unliquidated damages, and it being conceded that a demand for unliquidated damages will not support an original attachment in this State, the affidavit must be held insufficient.

But appellant says that the court erred in refusing plaintiff permission to file an amended affidavit; that the nature of the demand appears from the declaration and not from the affidavit; that an affidavit may support two theories of recovery, one ex contractu and the other ex delicto, as in May v. Bisserta, 211 Ill., 310.

We think the principal criticism to be made on the second affidavit is as appellee suggests - that it was the evident purpose of it to conceal and not set forth the nature of the indebtedness. This clearly appears from a consideration of the contents of the affidavits, both of which were before the court. It was perfectly apparent, so construing them in connection with the declaration filed, that the demand of the plaintiff was in either case one for unliquidated damages. In May v. Bisserta, supra, the affidavit showed a claim in assumpsit for liquidated damages.

Such being the case the court did not err in refusing leave to file the amended affidavit, although the general rule undoubtedly is that the courts should be liberal in allowing such

amendments as will promote justice.

The second section of the Attachment act requires the attaching creditor to file an affidavit setting forth the nature and amount of the indebtedness after allowing all just credits and set-offs. The amended affidavit alleges the amount claimed to be due after allowing credits and set-offs. With reference to the nature of the claim it set up that it was upon an implied contract for the payment of money received by the defendant for plaintiff's use, and also money paid for defendant's benefit. This, standing alone, is so indefinite as to give practically no information as to the nature of the demand. Taken in connection with the first affidavit it is well calculated to conceal the nature of it. This being true, we think the Judge did not err in refusing to permit it to be filed.

The judgment is affirmed.

AFFIRMED.

Dever, P. J., and McBurely, J., concur.

334 - 26508

MARGARET S. CRAINIE,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY,
CHICAGO CITY RAILWAY COMPANY,
CALUMET & SOUTH CHICAGO RAILWAY
COMPANY and THE SOUTHERN STREET
RAILWAY COMPANY, Operating and
Doing Business Under the Name of
CHICAGO SURFACE LINES,
Appellants.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

224 I.A. 650

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendants from a judgment in the sum of $5,000 entered by the court upon the verdict of a jury. The action was in case. The declaration in its first count alleged that on the 23rd day of August, 1917, at the intersection of Broadway and Granville avenue an automobile in which plaintiff was riding was struck by one of defendants' street cars and plaintiff thereby injured. It alleged that the collision was the result of the negligent and careless manner in which defendants' servants operated the street car. In other counts it was alleged that defendants were negligent in failing to keep a proper lookout; failing to keep the car in proper control; failing to ring a bell or give warning of its approach, in operating its car at a dangerous rate of speed and in operating the car when its equipment was in a defective and dangerous condition. The defendants filed a plea of the general issue. At the close of the evidence the defendants made a motion for a directed verdict, which was denied, and motions for a new trial and in arrest of judgment after the verdict were overruled.

The defendants here contend that the judgment should be reversed with a finding of fact, because the evidence manifestly preponderates against the plaintiff and in favor of the defendants.

Some of the facts are undisputed. Granville avenue is a public street extending east and west on the North side of the city of Chicago. It is intersected at the place where the accident occurred by Broadway, a street which extends in a general southerly and northerly direction. Broadway is about 100 feet wide; two street car tracks are laid in the center of it. On the southwest corner of Granville and Broadway is a drug store with a frontage of 25 feet. South of this on the same side of the street is a dry goods store with the same frontage. Broadway both north and south of the intersection is occupied by business places with the exception of the northwest corner of the intersection, which at the time of the accident was vacant.

Broadway is 99 feet 7 inches wide from building line to building line. The roadway space from curb to curb is 39 feet 7 inches in width. It is 19 feet 9 inches from the east building line to the east curb. It is 22 feet 4 inches from the east curb line to the east rail of the northbound track. Each track was 5 feet wide from outside to outside of rail, and the space between the two tracks was 5 feet in width. The space from the west rail of the southbound track to the west line of the curb was 20 feet 3 inches. The west sidewalk from the west curb line to the west building line is 20 feet 3 inches wide. The distance between curbs on Granville east of Broadway is 32 feet 2 inches and west of Broadway is 33 feet. The sidewalk on the north side of Granville is 22 feet 5 inches from building line to curb. The sidewalk on the south side of Granville from building line to curb is 24 feet 3 inches. The block north of Granville is 750 feet long. These distances are taken from appellant's statement of facts, the correctness of which the appellee does not question.

Plaintiff was a married lady 27 years of age. At the time of the accident she lived at 5455 Woodlawn avenue, which is on the South side of Chicago. She was at this particular time

making a journey from her home on the South side to the home of a friend living at 6200 Lakewood avenue, which was one block west of Granville and Broadway. The parties rode north on Sheridan Road to Granville, where they turned towards the west and drove in that direction several blocks to the east side of Broadway. The automobile in which plaintiff was riding was known as a Hudson Superaix Roadster, having a single seat which held three persons.

The driver, who was Miss Hornbeck, sat on the lefthand side of the seat, the plaintiff on the extreme right of the seat, and a sister, Miss Summons, sat in the middle. The brake and the gearshaft were to the right of the driver and her uncontradicted testimony is to the effect that she had plenty of room to move her feet and work the levers. Miss Hornbeck was engaged to drive the automobile for plaintiff, as plaintiff herself had never driven one. She had been so employed on a number of prior occasions. She was 19 years of age.

The street car involved in the accident was 50 feet long and weighed 25 or 26 tons. It started on its run at Devon avenue, two blocks north of the intersection where the accident occurred. Its destination was the loop district downtown, which it was supposed to make in 50 minutes. From the beginning of its journey it did not stop until the accident occurred. There was a motorman in front and a conductor in the rear. Both of these were experienced employes. There was one passenger upon the car at the time of the accident. He was not produced as a witness.

As to the precise manner in which the accident occurred, there is a sharp conflict in the evidence.

The evidence for the plaintiff was given by Miss Hornbeck, the driver, Miss Summons, the sister of plaintiff, Dr. Montgomery, whose office was above a dry goods store at 6205 Broadway,

on the northeast corner of the intersection, Mr. Luff, who at the time of the accident was in a real estate office situated the first door south of the dry goods store on the west side of Broadway and south of the intersection, one Wagner, a window trimmer, who says he saw the accident from the window of the dry goods store, and the plaintiff herself.

The testimony as to the occurrence by defendants was given by the conductor of the street car, the motorman, Mrs. Monahan, who, the witnesses agree, was just leaving the southwest corner of the intersection and walking northwest on Granville avenue, pushing a baby cart before her; one Banker, a truck driver for Marshall Field & Co., and who was driving north on Broadway on the east side of the street, about 150 feet south of Granville avenue, and Mr. Renning, who was superintendent of the Chicago Motor Bus Co., and who says he had just come out from the drug store and started to walk east on the intersection, intending to go across Broadway.

The testimony for plaintiff was in substance that as the automobile approached Broadway it stopped within about 25 feet of the building line; that the occupants looked both ways; that the street car was then coming from the north and at a medium rate of speed; that as it approached the intersection it slowed up as if to stop for passengers on the north side of the intersection; that certain persons were standing there for the apparent purpose of taking the street car; that it did not stop, but suddenly increased its speed; that the automobile in the meantime had started to cross, at first slowly, and that as the street car reached the stopping place the automobile reached the first rail of the northbound track; that when it was in the center of the southbound track it was struck by the street car proceeding at a great rate

of speed. The witnesses for plaintiff say that no bell or gong was sounded. The evidence tends to show that the right hind wheel of the automobile was demolished; that the automobile was turned around twice and landed against the sidewalk and stopped under the window of the drug store.

On the other hand, the witnesses for the defendants say that the automobile never came to a dead stop, but that it almost stopped as it approached the crossing; that as a matter of fact the street car was then nearer to the intersection than was the automobile, and that the street car first entered the intersection; that at the time the automobile stopped or seemed to stop, the street car had passed over the north line of the intersection; that it increased its speed as it entered the intersection, and that after the street car had so increased its speed the automobile suddenly shot forward, moving from the center of the street in a southwesterly direction and at a very great rate of speed, which one of the witnesses for the defendant places at 30 miles an hour. Some of defendants' witnesses say that the driver of the automobile stood up, tried to jump out of the automobile, and by her actions indicated that she had lost control of it.

The witness Wagner, who says he saw the accident from the window of the dry goods store, contradicts the witnesses for plaintiff as well as for defendant, in saying that the street car at no time slackened its speed, but that it continued to go right ahead and until the moment of the collision. His opportunity for observing the speed of the street car was not as good as that of the other witnesses, and we think his statement in this respect must be disregarded.

Miss Hornbeck says that when the automobile was struck the street car was going at a speed of from 30 to 35 miles an hour. Wagner says full speed. Miss Sammons says that it began to slow

up three or four doors from the corner where the cars usually commence to stop, and that from the time she saw it commence to slow up she did not see it until the crash. The plaintiff says that the car was going, as it so came, between slow and fast medium when at the moving picture house in the middle of the block; that she knew the car was coming, heard the noise which got louder and louder as it came toward her; but she does not give any estimate of the speed.

Mrs. Monahan says that the street car was coming along but not very fast; the motorman says that at the time he started forward on the crossing he was going 8 or 10 miles an hour, and that at that speed it would take 35 or 40 feet to stop the car; that at the time of the accident his car was not going to exceed two miles an hour, and that he had the car in complete control. The conductor does not give any estimate as to its speed, while the truck driver says that when he saw the automobile leap forward he heard the brakes on the street car; that it was going slowly, slowing down; that he could not tell exactly how fast.

Remning says that the moment he saw the automobile start forward the street car started slowing down pretty quick, but does not give any information as to its speed.

Defendants say that it is possible to demonstrate that plaintiff's version of this accident is impossible, and they invoke the rule of law that there may be such interest improbability in the statements of witnesses as to induce the court or jury to disregard their evidence, even in the absence of direct conflicting testimony. This contention is based in part upon certain uncontradicted physical facts which appear in the record. Appellant says that if the street car was where plaintiff's witnesses say it was when first observed, then the street car must have traveled through the intervening space at the impossible speed of over 30 miles an hour to the point of the accident; that if it was where plaintiff's wit-

nesses say it was when the automobile reached the first track, the street car must have traveled over the intervening space at the rate of 36 miles an hour, which, taking into consideration the almost undisputed testimony that it slowed up in some degree as it approached the intersection, is equally impossible; that if the front of the car was at the north line of Granville, as the driver says, when she saw the street car was not going to stop, and when it increased its speed, it would have been necessary for the street car to attain a speed of 30 miles an hour in less than a car length, which would also be a physical impossibility; that the proximate distance from the space where plaintiff's witnesses say they first saw the street car to the point of collision was more than 400 feet; that the distance from the automobile to the point of collision was about 55 feet; that it was impossible for the street car to change speed as described and make this distance in the same time that the powerful automobile at a suddenly increasing speed traveled only 55 feet. Appellants therefore say that every feature of plaintiff's version is a physical impossibility, and hence draw the conclusion that the same must be rejected as contrary to the truth.

The argument is ingenious and plausible, but not convincing. Few witnesses are able to relate with complete accuracy events of this kind. Their statements as to time and distance must of necessity be very much matters of opinion. Witnesses do not usually hold watches in their hands while accidents are occurring, nor do they take the time to get the distances with mathematical accuracy. It would not, we think, be fair in this class of cases to disregard the entire testimony of witnesses because they may have failed to estimate accurately time and space. The calculation from which appellant deduces his conclusion is necessarily based on the assumption that the automobile started

westward the same instant that the car was observed moving southward. The street car was then in motion, according to the testimony of plaintiff's witnesses; the automobile was not in motion. If we assume even a moderate rate of speed for the street car and allow a few seconds as a reasonable time for the automobile to be put in motion, the problem at once takes on a very different aspect.

Of course a supposed fact, although it may be testified to, which is a physical impossibility should be disregarded and eliminated from the case; but it by no means follows that the entire testimony of witnesses should be disregarded because a supposed fact, resting necessarily on their opinions, in which they may be honestly mistaken, prove to be untrue. If we should apply such a rule, plaintiff's witnesses are not the only ones in this case who would be discredited.

We think the proper method is to eliminate all impossible facts testified to, reconcile as far as possible statements which seem to be contradictory, and from these and the uncontradicted facts determine as near as may be the precise thing that occurred.

We have gone over the evidence in this case, and have come to the conclusion that the jury was justified in finding the defendant guilty of negligence. In the first place, we are satisfied there was evidence from which the jury could reasonably find that the street car proceeded at a negligent rate of speed under all the circumstances. The street car was to make its trip to the loop in 50 minutes, and the rate of speed to which defendants' witnesses testified is inconsistent with the idea of making the trip in the appointed time. The force of the impact of the street car against the automobile is inconsistent with the rate of speed such as testified to by defendants' witnesses. A photograph of the automobile, as it appeared a short time after the accident, is in evidence. Not only does its condition tend to show that it was

struck by the street car with very great force, but its condition also tends strongly to show that the testimony of the motorman to the effect that the automobile struck the left corner of the car and glanced off from it is not in accordance with the facts, but on the contrary that the statements of plaintiff's witnesses that the street car struck the right side of the car and back of the middle are true.

The evidence is not quite clear as to the distance which the street car ran after the collision, which is a very important fact in determining whether the motorman was in the exercise of care. Wagner's estimate is 15 feet, but other evidence is to the effect that it stopped beside the dry goods store, which stood on the right side of Broadway, while the evidence for defendants indicates that it ran only a few feet.

A fact tending strongly to support plaintiff's contentions is that not only the occurrence witnesses for the plaintiff, but several for the defendants as well as some witnesses for plaintiff who did not see the occurrence, testify to having heard a "crash" at the time the accident occurred. This "crash" brought Mr. Montgomery and Mr. Luff from their offices. The conductor and Mrs. Monahan both describe the impact by the use of that term. We think, therefore, that the jury was justified in finding defendant negligent, as alleged in some of the counts of the declaration.

But defendants contend that plaintiff is barred by contributory negligence. In this connection it is to be noted that the trial court by the 5th instruction told the jury, as a matter of law, that if they should find from the evidence that the driver of the automobile was guilty of any negligence which contributed or proximately contributed to cause the accident in question, then such negligence, if any, was to be imputed to the

plaintiff in the case. Plaintiff has not assigned any cross errors. We shall therefore assume that the law of the case is as stated in the instruction.

Ordinarily, of course, the question of contributory negligence is for the jury, and the plaintiff in this court is entitled to the benefit of the finding of the jury in this respect unless the evidence manifestly preponderates the other way. This accident occurred at a street corner. The general rule which gives to a street car the right of way does not therefore obtain. Booth on Street Railways, p. 400, sec. 304, where the author says:

> "As already stated, as a general rule, especially between street crossings, cars have right of way superior to that of other vehicles and pedestrians; this preferential right to be exercised in a reasonable and prudent manner. But this rule does not apply to the crossing of tracks at street intersections. There the car has a right to cross and must cross the street, and vehicles and foot passengers have the right to cross and must cross the railway track. Neither is a superior right to the other, the right of which must be exercised with due regard to the right of the other, and in such a careful manner as not unreasonably to abridge or interfere with the right of the other. This equality of right, however, does not absolve one who is about to cross the track from the duty of taking proper precaution to avoid accidents."

In the very recent case of Stolte v. Baker, general number 26747, not yet reported, this court said:

> "The rule that both parties have equal rights at intersections does not mean that the two vehicles are equally entitled to use the crossing at the same moment. Ordinarily the rule is that the vehicle which reaches or enters the crossing first should have the right of way, but this 'does not imply that regardless of the speeds of the respective vehicles or the possibilities as to stopping them, or guiding them from the path in which they are approaching the intersection and other facts that may be involved, the one first reaching or entering upon the intersection may be driven ahead, regardless of consequences and relying upon the driver of the other vehicle stopping in time to avoid a collision.'"

We agree with the appellants in this case that plaintiff's duty to exercise due care was upon her during the entire time that her automobile was travelling over the crossing.

It is fair to assume, as appellants suggest, that the

motorman had no desire to injure the plaintiff or other occupants of the automobile, and we think it may also be fairly assumed that the occupants of the automobile did not desire to be struck or injured. But a preponderance of the evidence, a clear and manifest preponderance of it, indicates that the street car did slow down in a manner to indicate that it was to stop at the crossing for the purpose of receiving passengers, and the uncontradicted evidence is that it did not so stop, but on the contrary increased its speed.

The question of the contributory negligence of the driver of the automobile which in this case, if it existed, must be imputed to the plaintiff, must in the last analysis depend on what the actual situation was at and just prior to the moment when the automobile was started across the southbound track. If the apparent situation was such that in the exercise of ordinary care she might proceed to cross the track, then she was not guilty of contributory negligence; but on the contrary, if the apparent situation was such that a person in the exercise of ordinary care would not have attempted to cross it, then she was guilty of contributory negligence and the plaintiff cannot recover.

The situation here is not unlike that which existed in Loftus v. C. Ry. Co., 293 Ill. 475. The party crossing was in that case a pedestrian, and the preponderance of the evidence clearly indicated and the Appellate court found that as a matter of fact, while the street car slowed up as it approached the crossing, the motorman continuously sounded the gong in a manner to indicate that it was not going to stop. A preponderance of the evidence here indicates, we think, that the gong was not sounded in any such a way. Considering the alleged contributory negligence there the Supreme court said:

[illegible] of the automobile, and we think it may [illegible] that the presence of the automobile [illegible] be inferred. But a preponderance of the evidence, [illegible] evidence is that it did not [illegible] the speed.

The question of the contributory negligence of the [illegible] of the automobile [illegible] in this case, it is claimed, [illegible] the plaintiff, [illegible] the automobile was [illegible] contributory negligence [illegible] negligence and the plaintiff [illegible].

The situation here is not unlike that [illegible] [illegible] v. [illegible], [illegible]. [illegible] was a pedestrian, and the preponderance of the evidence clearly indicated [illegible] fact, while the person [illegible] the [illegible] that it was not going to stop. A preponderance of the evidence here indicates, we think, that [illegible] a walk. Considering the [illegible] negligence [illegible] Supreme Court said:

"In considering this question the jury had a right to consider not only the question of distance that the car was away from the deceased, but also the further fact that the car at about this time had begun to slow down its speed, and would probably stop at the crossing. If it can be said that it was evident that the car was not going to stop, and that the deceased had notice of that fact by the constant ringing of the bell, still the deceased had a right to assume when the car began slowing down its speed, that it would not again be speeded up and run across the street crossing at an unlawful or unusual rate of speed.

The jury were also warranted in taking into consideration the fact that the car was approaching the deceased on almost a direct line, and that for that reason he was in a position least favorable to judge of its speed. This court has several times declared that a person attempting to cross a track of a street railway ahead of a moving car, is not necessarily guilty of contributory negligence. Such question must necessarily depend upon the proximity of the car and the speed with which it is moving and upon all other facts material in determining the question whether it is or is not prudent to undertake such crossing. Whether in such instance reasonable care was exercised in going upon the track in front of a moving car, is generally a question for the jury under proper instructions."

We think it was so in this case. Twenty-nine instructions were given for the defendants, and the jury was thoroughly informed according to defendants' views on every material point of law in the case. The seriousness of the plaintiff's injuries is not questioned. There is no claim that the damages allowed are excessive.

The duty cast on an appellate court of reviewing the trial court as to the facts is, in this class of cases, particularly onerous. It is the duty of the court, as appellants suggest, to see that the rights of property are protected. It has also cast upon it the equally important duty of seeing to it that suitors who have just causes of action shall not be deprived of their rights. There was in this case a fair trial by an impartial jury. An impartial and fair minded Judge has approved the verdict and entered judgment. We are unable to say that the verdict is manifestly against the weight of the evidence, and the judgment must therefore be affirmed.

AFFIRMED.

Dover, P. J., concurs.
McSurely, J., dissents.

334 - 26508

MARGARET S. CRAIGIE, Appellee, vs. CHICAGO RAILWAYS COMPANY, CHICAGO CITY RAILWAY COMPANY, CALUMET & SOUTH CHICAGO RAILWAY COMPANY and THE SOUTHERN STREET RAILWAY COMPANY, Operating and Doing Business Under the Name of CHICAGO SURFACE LINES, Appellants.	APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

224 I.A. 650

SUPPLEMENTAL OPINION UPON PETITION FOR REHEARING.

The appellants in this case have filed a lengthy petition for rehearing. It is contended with earnestness that "The present opinion is based on utterly inconsistent and irrecolable premises;" that in one part of the opinion the court finds that the street car was approaching the point of collision at very great speed, but that in passing on the issue of contributory negligence the court finds "the street car was crawling along at greatly slackened speed ***."

Counsel in the case has apparently misunderstood the opinion. The statement therein that the street car "did slow down," if read with the context, can only be taken to mean that the street car then moved at a slower rate of speed than that at which it was moving immediately theretofore.

Appellants also refer to the Loftus case in a way to indicate that case was brought into this one by the court. This is a mistake. The Loftus case was cited by appellee in her brief and much relied on by her. Appellants, however, purport to give the history of that case, and in doing so go outside the record, saying, "It is impossible to resist the conclusion that the

DEPARTMENT OF PAGANS.
Antioch.

To:

Office director (Pagan).
Citizen city manager (Antioch).
Citizen's whole office staff.
Military and civil security officer.
Senior officer, Department and
Pagan Security Bureau for the Home of
Antioch Security Zone.

Confidential.

Confidential matter with priority for immediate.

The operations of 1201 and 5am 1201 a Security police- the disaster. It is proposed to-morrow afternoon the Pagan prison colony is issued an circular (enclosed) and issue- relative problem; then at the end of the relative the body Pagan that the issues and the operations the people of Antioch at very great speed, but that is passing on the front of Antioch- city mobilized the work first. The street the working class at certain revolutionary issue ---!

Concern is the time the [illegible] the epidemic. The planned [illegible] "If what will the Antioch Pagan Prison," If what will the epidemic, and only is [illegible] the street and the [illegible] a [illegible] which it was moving immediately [illegible].

Specialists also notes on the [illegible] that is not to indicate that case was [illegible] the by the [illegible]. This is a [illegible]. The [illegible] and [illegible] is [illegible] and [illegible] by [illegible]. Specialists, however, [illegible] the [illegible] of [illegible], and is [illegible] the [illegible], [illegible]. It is impossible to [illegible] the [illegible] the

Supreme court was largely influenced in its decision by the court's realization of the injustice of the verdict." We are not able to construe the opinions of the Supreme court in this manner, but are confined in our interpretations of the decisions of that court to what is actually decided in the cases and said in the opinions.

The petition for rehearing is denied.

PETITION DENIED.

339 - 26513

R. N. NETMAN,
Appellant,

vs.

J. L. NANSON, Doing Business as I. & M. Garage,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

224 I.A. 650

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The plaintiff, who is appellant in this court, sued appellee, alleging in his statement of claim that May 6, 1919, he stored a Ford automobile in defendant's garage and that through the negligence of defendant it was damaged by fire. Defendant was personally served with summons June 11, 1920, and June 16, 1920, entered his appearance by an attorney, and June 17th obtained an order extending the time within which he might file an affidavit of merits. July 1, 1920, an order was entered that it appearing to the court that the plaintiff had filed, as provided by law and the rules of the court, an affidavit showing the nature of plaintiff's demand and the amount claimed to be due the plaintiff from defendant after allowing to the defendant all just credits, deductions and set-offs, and that the cause was a suit for the payment of money, and that the defendant was in default for want of affidavit of merits or defense, it is "on motion of the plaintiff ordered by the court that judgment be entered herein against said defendant by default for want of such affidavit of merits."

July 2nd plaintiff withdrew his jury demand and the record shows that the cause was submitted to the court for trial without a jury, and that plaintiff was granted leave to amend the statement of claim on the face thereof instanter. The court entered a finding that defendant was guilty in manner and form as charged, and assessed plaintiff's damages at $300 and entered judgment on

the finding. August 19, 1920, an order was entered by the court vacating the orders.

The affidavit of defendant is to the effect that immediately upon receiving the summons he communicated with his attorney and instructed him to look after his interests in defending the suit and advanced the necessary court costs and fees to enter his appearance, and also furnished him with the necessary facts to establish his defense; that he relied upon said attorney, did not further watch the court calls or investigate the files with reference to subsequent proceedings until he was served with execution on the 13th of August, 1920, which contained the information that a judgment had been entered against him; that he thereupon called up the office of his said attorney and learned that he was out of the city on a vacation; that on the next day he examined the files in the cause and learned for the first time that his appearance had been filed but no affidavit of merits setting forth his defense, and the judgment had been entered against him by default. He says that he personally did not receive notice of the plaintiff's motion to withdraw the jury demand nor of his motion to amend his statement of claim, and that no evidence appears in the court records or files of plaintiff having served any such notice on his attorney or anyone for him regarding the motion. He also sets up that he has a good defense to the whole of plaintiff's claim.

Appellant contends that the court erred in vacating the judgment because this petition shows affirmatively that defendant was guilty of gross negligence in failing to defend. Hurd's Rev. Stat. 1919, chap. 37, sec. 284, in substance provides that the Municipal court is without jurisdiction to vacate a judgment after more than thirty days have elapsed except upon such showing by petition as would be sufficient to cause the judgment to be vacated if presented by a

bill in equity. It is the unquestioned law that in such case in chancery it must affirmatively be made to appear, not only that the judgment is unjust and the result of fraud, accident, or mistake, but also that it was not due to any negligence on the part of the petitioner or his attorneys. American Surety Co. v. Bliss, 214 Ill. App. 463; Orient Mfg. Co. v. Channell, 209 Ill. App. 438; Gallay v. Mathia, 195 Ill. App. 170; Hollister v. Mehrn, 264 Ill. 535; Kretschmar v. Ruprecht, 230 Ill. 492; Kahn v. Gaion, 169 Ill. 299.

The same cases establish the proposition that a defendant may not in such case set up as an excuse for his own negligence the negligence of his attorney, for the reason that the acts and omissions of the attorney must be regarded as his own.

Defendant contends that the judgment in question was invalid in that the statement of claim was insufficient to support the judgment. This contention cannot be sustained. In the first place because this appeal is not from the judgment, but from the order which was entered setting it aside; and in the second place, because there is no motion in arrest of judgment by which the validity of the judgment can be tested.

Defendant also contends that the judgment is subject to the further objections that after default had been entered plaintiff, without the knowledge or consent of the defendant, withdrew his jury demand and submitted the cause to the court; and that it is based upon the finding of the court and not upon a verdict of a jury. For the reasons expressed above these questions are not before us.

We think the court erred in entering the order setting aside the judgment. The order will therefore be reversed and the matter remanded.

REVERSED AND REMANDED.

Dever, P. J., and McSurely, J., concur.

[illegible] is worthy. It is the argument that that is made more in [illegible] is more difficultly to make it convincing, one feels that the judgment is marked not the result of [illegible], [illegible], or [illegible], but also that it was not due to any [illegible] in the [illegible] of the [illegible] or his [illegible]. [illegible] v. [illegible], [illegible] 222, 227, 228; [illegible] [illegible] v. [illegible], [illegible] 222, [illegible]; [illegible] v. [illegible], [illegible] 222, [illegible], 240; [illegible] v. [illegible], [illegible] 222, [illegible]; [illegible] v. [illegible], [illegible] 222, [illegible]; [illegible] v. [illegible], [illegible] 222, [illegible].

The same cases establish the proposition that a [illegible] may not be so much [illegible] as to be [illegible] for his [illegible] [illegible] the negligence of the [illegible], for the [illegible] that the [illegible] and [illegible] of the [illegible] must be regarded as the [illegible].

Defendant asserts that the judgment in question should be that the statement of claim was insufficient to support the judgment. This contention cannot be maintained. In the first place because this appeal is not from the judgment, but from the order which was rendered dismissing it solely, and in the second place, because there is no doubt the claim is clear on judgment for which the validity of the judgment can be tested.

Defendant also contends that the judgment is defective in the further respect that other claims had been [illegible] [illegible], without the Immediate and [illegible] [illegible] of the [illegible], without this Jury Trial and [illegible] the [illegible] in the [illegible] and that it be based upon the finding of the court and not upon a verdict of a jury. But the opinion [illegible] [illegible] [illegible] [illegible] [illegible] [illegible].

The Trial Judge must avoid in [illegible] the [illegible] [illegible] the judgment. The order will therefore be reversed and the [illegible] [illegible].

[illegible] AND [illegible].

363 - 26537

ALBERT M. ELLIS,
Appellee,

vs.

THE METROPOLITAN WEST SIDE ELEVATED RAILWAY COMPANY, a Corporation,
Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

224 I.A. 650

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant Railway company from a judgment in favor of plaintiff for $500, entered upon the verdict of a jury. The cause was submitted upon the issues as made up by a plea of "not guilty" to the original and first additional counts of plaintiff's declaration, other counts having been withdrawn.

The original count alleged that the defendant operated a railroad at and about Lexington street in the city of Chicago and near Lakewood avenue, which road at that place ran upon the surface of the ground; that plaintiff was a passenger riding in an automobile along Lexington street (which was a public highway) and in the exercise of due care; that defendant so carelessly, negligently and improperly ran, managed, operated and controlled one of its cars that by means thereof the car struck the automobile and the plaintiff injuring him.

The first additional count alleged that defendant was operating a railroad which intersected Lexington street; that plaintiff was in an automobile as a passenger, not driving or operating it, and was passing over said intersection in the exercise of due care; that it became and was the duty of defendant to keep the crossing in good repair, which it failed to do, and carelessly and negligently suffered, permitted and allowed said crossing at and

about the said rails there to be worn, uneven, depressed and rough and have certain large and deep holes therein, whereby a vehicle passing thereover would be hindered and delayed and rendered liable to be stuck by the cars passing over the tracks, and that thereby the collision in which plaintiff was injured was caused.

In its argument for a reversal appellant asserts three propositions. It says that the evidence does not show any negligence in the operation of defendant's train, as alleged in the first count of plaintiff's declaration; that the only negligence shown, if any, is that charged in the additional count as to the maintenance of the crossing, but this it says was not the proximate cause of the accident, and that the evidence further shows plaintiff was guilty of such contributory negligence as to bar his recovery.

The accident in question occurred in the early evening of May 14, 1919, at the intersection of the railroad and Lexington street. At this place the railroad tracks were laid on the surface of the ground. They descended from the elevation at Laramie avenue, ran west between Harrison and Flourney streets for about a block and a half, then curved to the southwest across Flourney street, and continued in this direction to and across Lexington street, which was a public highway running east and west. The immediate neighborhood was sparsely settled. The accident occurred at about 8:15 "daylight saving time." Plaintiff was riding with a man named Izard, who was driving a Ford automobile east on Lexington street. Neither the driver nor plaintiff was familiar with the crossing. They first noticed the railroad when about 60 feet from it, and when it was called to the attention of the driver by plaintiff, at plaintiff's suggestion the driver stopped. They both testify that they looked in each direction and listened but saw nothing and heard nothing. The driver then started to cross at a speed of

about the main ends there is to be done, centre, depending and
though not have activity large but that light thought clearly a
reality passing therefore until is learned and taught and
probably likely to be first by the more popular over the crowd,
and that thereby the activity is right although the legend
was assured.

In his argument the a practical equality lacking those
privileges. It says that the without take all they by social
phase in the question of individual's being, so without in the
first work of plaintiff's declaration that we only conclusion
above, if any, is that stated in the individual good or in the
abandonment of the property, but this it may be not the principle
based of the pleading, and that the district further have violated
the rights of such individual conclusion is to the its property.

The judgment in question concerned in the high court
day of July 1s, 1910, on the determination of the relations and the
lower stated. In this place the relations stands very high on the
matter of the ground. Also discussion into the situation is stated
because the good between liberty and thought activity in that a
than and a half, then moved in the conference among further
above, and questioned in this discussion to the matter between
above, which was a public agency months ago and work. The
immediate relationship was quarrels relation. The matters assumed
at about 8:15 Tuesday point time." PLAINTIFF was going for a
and stand front, the are during a fact although not in judge-
ing above. Unless the issues are plaintiff was condition old the
speaking. They first making the related also stand of that time
it, and then it was going to be attention of the money by place
LIFE, as plaintiff's property the other liberty. They left it-
self that they based in such circumstances and relations had are standing

four or five miles an hour. When the front wheels of the automobile were just about on the rails of the first track they heard the screech of a whistle and saw the train bearing upon them 30 or 40 feet away. When the automobile was about half way across the tracks it was struck by the train and plaintiff was thrown out and injured.

While the defendant argues that there was no evidence from which the jury could find that the defendant was negligent, we think this contention cannot be sustained. Assuming, as defendant contends, that in other respects the preponderance of the evidence indicates a lack of negligence, there are two respects in which we think the jury might well have found defendant guilty; first, in the rate of speed at which it approached the crossing, and, second, in that it failed to maintain the crossing in a reasonably safe condition. Defendant says that if negligence with respect to the crossing be admitted, nevertheless it could not have been the proximate cause of the injury. No cases are cited to sustain this contention, and we think none can be found.

Whether certain negligence is or is not the proximate cause of an injury is ordinarily a question of fact for the jury, and we think that a jury might have reasonably found that defendant in the exercise of reasonable care could have foreseen in this case, not the precise accident of course, but that some such accident would probably occur as a result of its failure to maintain the crossing in a reasonably safe condition. The controlling question in the case therefore is whether the plaintiff was guilty of such contributory negligence as to bar his recovery. It is, as appellant suggests, our duty to examine this question not only as a proposition of law, but also as a proposition of fact, and we have the power, where it is clear that the plaintiff can in no case recover, to re-

[illegible]

[illegible]

[illegible]

verse with a finding of fact, which appellant in this case asks.

In considering this question we notice in the first place that the negligence of the driver, if any, is not to be imputed to the plaintiff. If he is barred it must be by his own negligence. Defendant says plaintiff was negligent in not seeing the approach of the train and in failing to warn the driver of it. The uncontradicted evidence is that for more than 300 feet distant the plaintiff's view of the railroad track was unobstructed, and defendant says that plaintiff will not be heard to say that he looked and did not see, when it must be apparent to everyone that if he had looked he would have seen. Many cases are cited in which that rule has been applied, and it is a well settled rule where the facts make it applicable. Plaintiff contends that it is not applicable here for several reasons. In the first place he says that as evening approached the light was insufficient, and that his failure to see the approach of the train may be excused on that ground. The evidence on this point is conflicting. One of plaintiff's witnesses says, "It was neither dark nor daylight at the time of the accident; it was dusk." The driver of the automobile says, "It was about half way between daylight and dark." Both plaintiff and driver say they could see about a block to the north, and they both testify that they could see the condition of the street upon which they were travelling and the crossing as they approached it. One of plaintiff's witnesses said it was getting dark, but he had no difficulty in seeing the collision 400 or 500 feet away. Several other witnesses testify that there was no difficulty at all in seeing. Henry J. Cox, in charge of the Government weather service, testified that the sun set on that day at two minutes after eight o'clock "daylight saving time;" that less than one half of the sky was covered with broken clouds, which were altudinous, and that twilight lasted that day over one hour and forty-five minutes.

Mr. Cox says that there was a shower that evening from 5:57 to 7:15, a thunder storm, and then a shower from 8:48 to 9:10.

A city police officer testified that he arrived some little time after the collision; that he did not notice any lights on the street; that it got dark and soon thereafter started to rain. The motorman says it was light at the time and that he could see as far ahead as ten blocks, and that there were no lights burning on the cars.

But plaintiff also claims that the failure to see the approaching train may be excused by reason of the defective approach to the crossing. The uncontradicted testimony is that the surface of the approach was rough and had a number of holes in it, and if so, it was most natural that the occupents of the automobile should to some extent have their attention diverted to this matter while passing over it. They were not familiar with the surroundings. The track was a deceptive one.

While we might hesitate if only one of these conditions existed to say that it was sufficient to excuse plaintiff from seeing and warning the driver of the approach of the train, we think we ought not to say so in the face of both of them. Taking the whole situation into consideration, the twilight, the condition of the crossing, the deceptive appearance of the tracks, the speed at which the car approached, as well as the evidence as to the failure of the defendant to sufficiently warn by bell or whistle of its approach, we think it became a question of fact for the jury as to whether plaintiff was guilty of contributory negligence in failing to see the approach of the train, and that we would not be justified in finding that the verdict, the effect of

which is to exonerate plaintiff from such negligence, is in this respect manifestly and clearly against the weight of the evidence. The judgment is therefore affirmed.

AFFIRMED.

Dever, P. J., and McBurely, J., concur.

394 - 26568

CALUMET COAL AND TRADING COMPANY,
Appellant,

vs.

CHRISTIAN BLACKFIELD et al.,
Appellees.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

224 I.A. 650

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff from a decree which dismissed its bill for want of equity. The cause was heard by the Chancellor on exceptions of complainant to the report of a master in chancery to whom the cause was referred. The decree overruled these exceptions and confirmed the report of the master. The proceeding was that of the usual creditor's bill. It was based on a judgment of $318.10 recovered by the plaintiff against the defendant, Christian Blackfield, on the 28th day of January, 1918, in the Municipal court of Chicago.

The bill sets up that execution issued thereon December 20, 1918; that due demand was made; that Christian Blackfield filed his schedule of his personal property, claiming it all as exempt, and refused to pay any part of the judgment; that on January 20, 1919, complainant filed a transcript of this judgment in the office of the Clark of the Circuit court, a like transcript in the office of the recorder of Cook county on January 31, 1919, and on the same day caused an execution to be levied on the right, title and interest of Christian Blackfield in certain real estate; that complainant was unable to realize the amount of this judgment on account of the condition of the title of this property.

The bill further alleges that on March 9, 1914, Christian Blackfield purchased and procured to be conveyed to himself and his wife Rosetta jointly, certain real estate described as No. 6012 Dorchester avenue; that on August 25, 1917, said Christian

being then indebted to complainant, for the purpose of defrauding it and others, made a pretended conveyance of these premises to his said wife Rosetta; that said premises were at that time the homestead of Christian and Rosetta, and the pretended conveyance thereof void because the wife did not join therein as a grantor, as required by the statute; that after complainant sued, Christian, with further design to defraud his creditors and hinder and delay them, caused and permitted his wife Rosetta to make a pretended conveyance of said real estate to one Lena Wichrowski.

It is further alleged upon information and belief that said Lena paid no consideration therefor, but holds the same in secret trust for Christian Blackfield. As a part of the same transaction said Lena executed a promissory note for the sum of $1,500, and to secure its payment executed and delivered a trust deed, by which said described premises were conveyed to Rosetta Blackfield; that Christian Blackfield has no other property out of which complainant's judgment can be collected.

Christian Blackfield, Rosetta, his wife, and said Lena Wichkowski were made parties defendant to the bill, which prayed an injunction and, with other things, general relief. The defendants filed a joint answer denying that Christian Blackfield purchased the property, alleging, on the contrary, that it was purchased by his wife Rosetta out of her money; that Christian had wrongfully caused the deed to be made in the name of himself and wife jointly, instead of in her name alone, as he was instructed to do; that the later conveyance was only for the purpose of giving her the title which belonged to her, and not for the purpose of defrauding creditors.

The answer further denied that the conveyance was void; that although they had, at that time, lived upon the premises, Christian held title only as trustee for his wife, and had no other interest It further denied that the first deed to Lena Wichkowski was fraudu-

lent. On the contrary alleged that she took the same in good faith and for value.

By an amendment to the bill afterwards filed the complainant set up that at various times from 1907 to 1916, Christian and Rosetta Blackfield purchased pieces of real estate which had been improved and enhanced in value by labor performed and material and money furnished by Christian Blackfield, and which properties had been successively sold by him at sums exceeding the purchase price paid by him and the costs of improvement, whereby large profits had accrued to him which had, in turn, been invested in other property and thus accumulated; that until after the indebtedness of complainant had become due in 1917, Christian Blackfield purchased and held all such properties in the name of his wife and himself jointly, but after August, 1917, when he made a pretended conveyance to his wife, he caused these purchases to be made in the name of his wife solely in order to place said properties beyond the reach of his creditors.

The amendment further set up in detail alleged facts as to such purchases and sales. To this amendment Christian and Rosetta Blackfield filed an answer in which they denied the facts as thus alleged, and denied that Christian Blackfield had any interest in such properties or that they had been improved by his labor or effort, but alleged that the properties were purchased exclusively by the monies belonging to Rosetta Blackfield, and that whatever accumulations resulted therefrom were for her benefit alone. The evidence upon the issues as thus made up was taken by the master.

It appears therefrom that Christian Blackfield was a mason by trade; that after his marriage to Rosetta he became a contractor and builder; that he opened an account with the complainant in May, 1913, and that the account was closed in May, 1917. This was the account upon which suit was brought in the Municipal

court and for which judgment was rendered in favor of the plaintiff.

Christian Blackfield was married to his wife Rosetta in 1902. He was then without money or property. She was the widow of one Novak. She says she got some money from his estate but does not remember the amount, and the estate was never probated. She also says she received something from her father's estate, but she is not able to state any definite amount nor any minimum amount so received in either case. At the time of her marriage to Christian she owned a little delicatessen store, which afterwards she sold for the sum of $300. She bought another store one or one and a half years later which she sold for the sum of $210.

In 1907 a vacant lot was purchased at 7749 Champlain avenue for the sum of $412. The title thereto was taken in the joint names of husband and wife. They erected a building on it by their joint labor. Exclusive of this labor the building cost $2,200, and of this amount $1,600 was provided by a mortgage loan executed by both husband and wife. The property was sold in 1909 for $2,900. In 1910 certain real estate at 6630 Evans avenue was purchased for $1,500, and after two years was sold for $1,750. In 1913 real estate known as 6910 and 6912 Dorchester avenue was purchased. There were two lots, one of which was improved by a building. The purchase price of both was $2250. In each case the title to the respective properties was taken in the name of Rosetta and Christian Blackfield as joint tenants. In 1914 the lot known as 6910, upon which the building stood, was sold for $2,650. The husband and wife then jointly negotiated a loan of $2500 on the vacant lot, both signing the notes and trust deed given for the loan. A bungalow was then erected thereon at a cost of $3,300, besides the labor which the husband and wife together put into it. Defendant Christian Blackfield had the plans drawn, superintended

the work and the letting of the contract. His workmen also put up the building. Thereafter the husband and wife resided in the property.

In the spring of 1917 a representative of the complainant called on Christian Blackfield and urged a settlement of his account with complainant. In August thereafter Christian Blackfield executed a quit claim deed, by which he attempted to convey this property to his wife. The deed was delivered and recorded August 27, 1917. She did not join in the deed and the conveyance left him without any property of his own. The husband and wife afterwards joined in a conveyance of this property to Lena Wichkowski for a consideration of $4275, $1575 was paid in cash, and the purchaser assumed a mortgage of $2,200, and executed a trust deed to secure the payment of $500 represented by 20 notes of $25 each, to the order of Rosetta Blackfield and maturing one each month. Two Hundred dollars of this amount had been paid at the time of the service of the summons in this proceeding.

The evidence further shows several other pieces of property have since been purchased, and that in each case the title thereto has been taken in the name of Rosetta Blackfield alone.

We think the evidence failed to establish that the sale to Lena Wichkowski was a colorable one, or that she holds the property in trust for either Christian Blackfield or his wife. On the contrary, we think it must be held that she is an innocent purchaser for value without notice of complainant's rights, so far as the title to the real estate is concerned. But as to payments made to Rosetta Blackfield by her after the filing of the bill and service of process, she stands in a different position. The filing of the bill and the service of summons amounted to an equitable levy upon the property in her hands. <u>First Nat'l Bank of Sioux City</u>

the evil and the Saviour of the Universe. His writings also put up this building. Nevertheless his tendency and style remains in the property.

In the drawing of MAIT a representative of the conservative party or Martian Aristocrat and begin a development of the Martian with sensitiveness. In Tamsin Lily after Martian Aristocrat accepted a just claim land, by which he attracted to convey this property to his wife. The deed was delivered and revoked August 27, 1917. He did not plot to the case for conveyance left him without any property of his own. The property and with alternative intent to a conveyance of this property to have disposed for a consideration of 1000, 1000 was said to wife, and the purchaser received a certificate of 1,000, and received a lease deed to secure the payment of 1000 consideration by 1/ right of his wife, by the order of Martian Aristocrat and delivered the deed merely. The Executed delivery of this deed had been left at the time of the marriage of the accused in this transaction.

The evidence further shows several other phases of property have also been possessed, and that in each case the title thereby has been taken in the name of Martian Aristocrat alone.

It also the evidence tended to establish that the wife by been illegally rule a minority use, or that the title the property was in trust for either Martian Aristocrat or his wife. In the contrary, it tends to show by that the is no in-between property the value without matter of consideration or figure, as the as the title in the real owner is unknown. The so property was in Martian Aristocrat by her after the filing of the bill. And evidence of witness, the whole in a different position. The filing of the bill and the marriage of Martian Aristocrat is an association that

vs. Gage, 93 Ill., 173; King v. Goodwin, 130 Ill. 102.

It is the contention of appellant that the court erred in overruling the exceptions to the master's report and entering a decree dismissing the complainant's bill, in view of the evidence, and we are inclined to the opinion that the contention must be sustained.

These various properties were put voluntarily in the joint names of the husband and wife. The evidence does not sustain the allegation of the answer that there was any mistake in this respect. Even if the wife had made a voluntary conveyance of a part of her interest to her husband, we think he could not thereafter convey it voluntarily as against his creditors. But he did not take these titles as a gift. The evidence shows the consideration, in part, was furnished by him. He contributed work and labor. He used his credit for the purpose of obtaining material which was used upon the premises and which enhanced their value. To permit the wife to voluntarily place the title of real estate in the name of her husband, thus giving him a credit which he uses to obtain material to improve them, and then permit a reconveyance back to the wife, thus making the collection of the debt impossible, would seem to permit a gross fraud.

Conveyances as between husband and wife are always closely scrutinized and regarded with suspicion. McKay v. McCaid, 298 Ill. 566.

Where a husband transfers all his property to his wife he must be held to have done so with the intention to defraud his creditors. Evans v. Bell, 263 Fed. 634; Marmon v. Harwood, 134 Ill. 104, Wilson v. Loomis, 55 Ill. 381, Hauk v. Van Inwegen, 196 Ill. 344.

We think half of the proceeds of the sale of the premises known as 6912 Dorchester avenue is in equity the property of Christian Blackfield and subject to the payment of this judgment.

v. Eaton, 23 Ill. App. 1st 1, Cantrell, 1st Ill. App.

It is the opinion of appellant that the court erred in overruling the objection of the lessor's agent and admitting a memo identifying the contraband with, in view of the evidence, and we are confined to the objection that the memorandum was not taken.

Other various propositions were put vehemently in the place issue of the instant and also. The evidence was not sufficient the allegations of the memo that there was no offense in view charged. When if the city had made a voluntary surrender of a pint of her liquors to her officers, we think to which not tender effect and by it voluntarily or against its wishes. But in it not have been either of a pint. The officers found the contraband, in point, was purchased by him. He contributed with the officers the most his credit for the amount of intoxicating liquor was based upon the questions and which concerned their value. To prevent the sale be voluntarily place the liquor if not remove to the home of her husband. This plaintiff the a credit which he came to state matters to improve him, and then put it a temperance book in the hole, thus making the motivation of the city inadmissible, would even be proof a crime trend.

Impeachment as between witness was with our charge clearly established and regarded with suspicion. Crime v. Commonwealth 122 Ill. App.

Where a testimony involves all the property in the city he must be will to have claim on this testimony is defined the condition. Crane v. Hall, 110 Pa. 41; Barnes v. Tarbox, 1m Ill. 1st, Kirkpatrick v. Jenkins, 82 Ill. 1st, Jones v. Ten Brook, 1m Ill. 1st.

The false duty of the treasurer if the duty of the city to be was taken as 8113 Deceptive evidence. It is equally the property of

As Rosetta Blackfield received the same, she is primarily liable therefor, and as to that part paid since the service of summons, Lena Wichowski is secondarily liable. The decree dismissing complainant's bill was therefore erroneous, and the decree will be reversed and the cause remanded with directions to sustain the exceptions, Nos. 1, 2, 3, 5, 6 and 7 to the Master's report and to enter a decree in conformity to the views herein expressed.

REVERSED AND REMANDED
WITH DIRECTIONS.

Dever, P. J., and McSurely, J., concur.

As Martin Blanchfield remarks his book, the ex-Kennedy aides
Sorensen, and so is that part which shows the activism of Lyndon
Johnson Blanchfield is successfully (also). The Bundy-Sorensen com-
plaint's still was thoroughly documented, and his charge will be
revisited and the issue remained well. Identical is Sorensen the
essentials. Does. 1, 2, 3, 4, 5 and 6 to the Library's remark and is
more a danger is reactivity to the other social movement.

Michael Lee Lanning
Fort Lauderdale.

Dates: 1. 1.4. and [illegible] 1. [illegible].

415 - 26589

HENRY WELTER,
Appellee,

vs.

B. D. ANGUISH,
Appellant,

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

224 I.A. 651

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff below, who is appellee here, began suit against defendant appellant by attachment. The affidavit alleged "the nature of plaintiff's said claim is for one car load of cabbage of the value of $441.67, which said cabbage was delivered to the said defendant, and for which said defendant gave his check for $441.67 to the plaintiff, and thereupon defendant removed said carload of cabbage from the State of Illinois, and at the same time stopped payment upon his check given as aforesaid, and refuses to pay for said cabbage, which said check was given to plaintiff for the purpose of deceiving said plaintiff."

The defendant appeared and filed an affidavit traversing the attachment affidavit of the plaintiff. Afterwards by an agreed order trial by jury was waived and the cause submitted to the court for trial, the attachment dissolved and the garnishee discharged. The court heard evidence and found the issues against defendant and assessed plaintiff's damages at $441.67, overruled motions for a new trial and in arrest of judgment and entered judgment on the finding, and from that judgment this appeal was perfected. The cause was tried without any written pleadings; it is therefore impossible to determine the nature of plaintiff's claim, except as the same appears from the evidence submitted.

The evidence for plaintiff tended to show that on or about November 13, 1919, plaintiff sold and delivered a carload of cabbage to the defendant for the price of $441.67; that plain-

tiff received therefor a check of defendant for that amount; that thereafter defendant stopped payment on the check. It appeared that the transaction on the part of the defendant was conducted by defendant's salesman, Mr. Dietz, and on behalf of plaintiff by one Andrew Welter, a cousin of the plaintiff. The testimony for the defendant tended to show that on the day in question Mr. Dietz met both Andrew and Henry Welter at the corner of Clark and South Water streets; that Dietz asked Andrew about cabbage and that Andrew replied that he had two cars, one a box car and the other a refrigerator; that they had some further conversation in regard to price; that Andrew said that if plaintiff offered the two cars at the price named, it would be all right with him; that Dietz then went to their office in the basement, where Andrew Welter told him that they had two more refrigerator cars loading in the country that ought to be ready that night or early next morning, and that Mr. Dietz could have the two cars which were refrigerator cars at $30 a ton; that he could also have the box car and refrigerator car, one at $29 and the other at $30 a ton; and Mr. Dietz testified, "I told him I would take the four cars. He said, 'Refrigerator car is here at 40th street, but another party got option on that for thirty minutes. If he don't take it you can have it.' I said, 'All right, I will take all four cars;'" that he told him he would give him a check for the car, and as soon as he got the weight on the two refrigerators to give them to him; that Andrew Welter replied that just as soon as he got them he would bring them over to the office; that a half hour or hour later Welter came over and gave him the number; that the witness then went to 40th street in a Ford, telling Welter to come back in an hour; that after looking at the car witness told him it ran a little small, and asked him if he would give him a dollar a ton off. He then gave him a check for that car, and Welter gave him a bill of lading, and said that just

as soon as he got a bill of lading on the box car or the initial, he would give a check for that, and as soon as he got the weights or car price on the two refrigerator cars that were to be loaded that day, to bring them in "and we would straighten up, which he said he would do;" that on the morning of the 13th he met Henry and Andrew Welter again and they asked about the check on the box car; that witness told him that as soon as he got the initial on the car he would give him a check; that in the course of an hour or two he again met them, when they asked about the check and witness replied, "You can have check any time you give me bill of lading or car initial. I said, 'How about two cars of cabbage that I bought with these other two that were to be loaded yesterday afternoon or this morning;" that Andrew replied that his man had tried to get him the day before at three o'clock, but he was out of the office and had not heard from him since; that witness told him just as soon as he heard and would get the car price and the weights, to come over and "we will straighten out;" that Andrew said he would do so; that on the 13th about four o'clock in the afternoon Andrew brought the bill of lading on the box car, which he turned over to the bookkeeper, for which she gave him a check; that the witness then asked Andrew about the other two cars, when he replied, "What two cars?" "I said, 'The two cars that I bought with this box car and the refrigerator;'" that Andrew then said, "I did not sell you two cars;" that after the witness started to recite the deal, Andrew said, "I cannot deliver the two cars I sold you, I cannot give you something I haven't got. We have plenty of cabbage in the field, but you know last night we had a heavy frost and the cabbage is frozen;" that witness then asked him, "How about the two cars that arrived on the C. & N. W. railway at 40th street that morning?" to which Andrew replied that he did not have two cars, and the witness told him that he, the witness, had been out there and seen the cars and got the car numbers; that Andrew then said that

these two cars had been sold to John A. Eck & Co. a week before, and that he was just delivering them; that Andrew then asked him if he wanted two cars of frozen cabbage, and witness told him he did not, and after Andrew left witness ordered payment on the check for the box car to be stopped because Andrew had refused to deliver the other two cars of cabbage as agreed.

Evidence as to the fair market price of the cabbage in Chicago on that date was also offered as tending to establish the defendant's damages.

The testimony of Dietz in its material parts was corroborated by several other witnesses, and evidence was further offered tending to show that on the morning of November 13th defendant sold to John Eck & Co. the two carloads of cabbage in question.

At the conclusion of the evidence the court, on motion of the plaintiff, struck out all this evidence with reference to the carloads of cabbage other than the carload for which the check in controversy was given. The motion was based on the ground that the contract with reference to the extra carloads of cabbage was barred by the Statute of Frauds. We think the court erred in striking out this evidence.

The theory of the defendant was that a contract of the sale of four cars was made as a single transaction, and the evidence offered in his behalf tended to support that theory. The Statute of Frauds is not applicable to such a sale where goods have been accepted in part by the buyer and actually received by him, or where he has given something in earnest to bind the contract or in part payment. Hurd's Rev. Stat.1919,p.2656,sec.4.

For the error in striking out this evidence the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Dever, P. J., and McSurely, J., concur.

Since the state had been sold to John A. Jay's for a very large price, and also to the Jay's exclusive, about that amount more than cost the it the counties the part of Lenox mortgage, not existed with the Jay's his son, and after having their state attorney received payment of the mortgage, he by the original transfer the property in fee simple to the original owner.

Evidence as to the disappearance value of the estate is difficult to find data has also efforts to construct a satisfactory conjecture.

The investment of money in the industrial profit the interest of property after utilization, and expenses was limited to have that at the auction of Jerusalem town attempt was made to pay the i.e. the ten methods of obtaining in cooperation at the disposal of the mortgage the money, or selling the property, money had not still also without any payment to the mortgagee of more than the mortgage and the property was sold at Tenacre. To claim the money owing to mortgagee.

The theory of the estate's was that a tenant of the mere of that year who was a single tenant, but the without attorney in the Tenant would be owned the Jay's. The Tenants of Lenox is not sufficiently to work a safe money which been changed in year by the Jayes and company, however by the, we seems to the given mortgage is mentioned to that the mortgage or in Jay's payment, Jay's not, [illegible], and.

The the river is existing and this without the place and is remained and the same remained.

Footnote not complete.

466 - 26540

CARL H. SCHUTZ and HELEN SCHUTZ,
Appellees,

vs.

EMIL F. MILLER,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

224 I.A. 651

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In this case the plaintiffs, who are appellees, sued defendant, who is appellant, in the Municipal court. They filed a statement of claim in which they alleged that the defendant was indebted to them for a breach of contract made February 20, 1919; that "said contract was to the effect that plaintiffs should assign to defendant their contract with Jennie M. Farwell for a warranty deed to real estate known and described as follows, to-wit, ****; that plaintiffs should receive from defendant at time of assignment $500; that plaintiffs should install electric fixtures, wire said premises, paint and decorate the interior of said premises for the further sum of $221; that plaintiffs should receive from the defendant the further sum of $200 for 'painting the exterior of said premises with two coats of white lead and linseed oil, and upon the completion of said painting ** furnishing to the defendant waivers of claims for mechanics liens.'"

The statement further alleged that the contract for a deed was assigned, the sum of $500 paid, the wiring, installation of electric fixtures, painting, papering and decorating of the interior was also done, and the sum of $221 paid therefor. "But although plaintiffs have at all times been willing to paint the exterior of said premises in accordance with the terms of said contract, defendant has refused and now refuses to permit and allow them to do and perform said painting, and has refused

and now refuses to pay plaintiffs said sum of $200 yet due and unpaid on said contract, and plaintiffs say that the work and labor and the materials necessary to do such painting in accordance with said contract 'and to turn over waivers of liens would cost plaintiffs the sum of $80,' and that plaintiffs make claim for the difference between said sum and said $200 yet unpaid."

Attached to this claim was the affidavit of Carl E. Schutz, in which he states that plaintiffs' demand is as stated, and that there is due to the plaintiffs from the defendant, after allowing defendant all just credits, deductions and set-offs, the sum of $111.

Summons was duly issued July 25, 1919, and the return shows that it was duly served July 26th thereafter. December 9, 1919, on motion of plaintiffs, the default of defendants was taken and judgment entered for the amount claimed. December 16, 1919, defendant made a motion that the default and judgment should be vacated and set aside, which motion was continued, and March 23, 1920, the motion to vacate the default and judgment was overruled, and from that order the defendant prayed and was allowed this appeal.

Defendant did not support his motion by any affidavit tending to show either diligence in defending the action or a defense to it upon the merits. It was necessary that both these things should be made to appear in the trial court. Hillenbrand v. Hillenbrand, 211 Ill. App. 428; Hudelman v. Raffenberg, 199 Ill. App. 463; Finkelstein v. Schilling, 139 Ill. App. 543. And upon such showing it is discretionary with the court whether the default will be vacated.

Defendant contends that the motion should have been granted, in the first place because the return of the bailiff does not affirmatively show that he resided or was found within the

jurisdiction of the court, and, secondly, because, as he says, the statement of claim does not set up a cause of action. If we could regard this appeal as one from the judgment itself, which evidently it is not, neither contention could be sustained. The return on the writ is as follows:

> "Served this writ on the within named defendant Emil F. Miller by delivering a copy thereof to her with a precipe and statement of claim and affidavit attached thereto, and at the same time informing her of the contents thereof in the City of Chicago this 28th day of July, 1910. Dennis J. Egan, Bailiff, by Edward Lavece, deputy."

We think this return was prima facie sufficient to give the court jurisdiction.

In support of defendant's contention that the statement of claim does not set up a cause of action, defendant cites a number of cases, including Matthews & Co. v. Lilienthal, 208 Ill. App. 203, Rutkowski v. Markowska, 203 Ill. App. 205. It is sufficient to say, on this point, first, that the record fails to show any motion in arrest of judgment, and, second, that a recent decision of the Supreme court precludes our sustaining the contention. Shay v. Robinson, 288 Ill., 181.

The order will therefore be affirmed.

AFFIRMED.

Dever, P. J., and McSurely, J., concur.

44 - 26674

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

JOSEPH GALLA,
Plaintiff in Error.

ERROR TO CRIMINAL COURT
OF COOK COUNTY.

224 I.A. 651

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff in error was indicted on four counts. The first charged the larceny of 32 gallons of alcohol and 36 gallons of vanilla, of value named, the property of Frank Lauer, on January 26, 1930. The second count charged that plaintiff in error bought and received said property while knowing that it had been feloniously taken, stolen and carried away. The third count charged burglary, in that plaintiff in error broke and entered the store of Lauer and took and carried away the goods. The fourth count charged that plaintiff broke and entered the store of Lauer, the doors and windows being open, with the intent to steal, take and carry away this property.

The State waived the felony and plaintiff in error entered a plea of not guilty to petit larceny. The cause was submitted to the court, a jury being waived, and the court after hearing the evidence found the plaintiff in error guilty of receiving stolen property, and further found that the value of the property received was $15. Judgment was entered upon the finding, and plaintiff in error was sentenced to the House of Correction for one year and to pay a fine of $500 and costs.

The record fails to show that any plea was entered as to the charge upon which plaintiff in error was convicted. There could be no valid trial without such a plea. This is an error,

Mr. Jordan answer delivered the address of the evening.

Stability is never one factors in this equation. The first enough the history of 47 citizens of Jackson and 39 citizens of Vandalia, of value trend, the intensity of final index, in December 28, 2010. The second round showed that stability is never bought and received well minority while growing that is but been fundamentally valuing, within and normal only. The first event changed varying, in that quantity is never there was written the years of Lincoln and land and remained every the party. The French house thought that stability bought and between the state of Lincoln, the taxes and citizens being work, with the latest is about, both and water away this property.

The State makes the funny and stability is never matters a plan of our policy is just lawyer. The value was mentioned to the court, a jury being related, but the court after hearing the evidence found the stability in every policy of increasing which income property, and further found that the value of the property remained was $15. Judgment was rendered upon the finding. Our plaintiff in error was entitled to the taxes of Lincoln for one year and is year's time of 1907 and after.

The record fails to show that any plan was offered at the change into which stability is never was constant. There would be no world first without what a plan. This is in error,

however, which may be corrected, and in order that this may be done we remand the cause. People v. Hoff, 211 Ill. App. 182; Johnson v. People, 22 Ill. 314; Yundt v. People, 35 Ill. 271.

REVERSED AND REMANDED.

Dever, P. J., and McSurely, J., concur.

333 - 26507

EDWARD J. ROTH, Administrator of the estate of RICHARD ROTH, deceased,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY et al.,
Appellants.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

224 I.A. 651

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

The defendant railway companies by this appeal seek to reverse a judgment for $6,000 rendered against them after verdict by the Circuit Court of Cook County, in an action for damages for negligently causing the death of plaintiff's intestate, Richard Roth, a boy of nine years of age, who was struck by one of defendants' street cars, eastbound in Belmont avenue, Chicago. The accident happened east of Lincoln street, about the middle of the block and opposite a school house, on December 7, 1917, about 12.30 o'clock during the noon hour.

Plaintiff's declaration consisted of five counts, the third and fifth of which were dismissed during the trial. Each count alleged that the deceased left him surviving a father, mother and sister; that at and before the time of the accident plaintiff's intestate was in the exercise of ordinary care for his own safety, and that said next of kin were at all times in the exercise of ordinary care for the safety of said intestate. The first count alleged that the defendants negligently drove, managed and operated the car. The second count pleaded an ordinance of the City of Chicago, restricting the speed of street cars and other vehicles, while running within 250 feet of any schoolhouse within the city during certain hours of any day when the school was in session, to a rate not greater than 5 miles per hour, and alleged that the defendants negligently and in violation

of said ordinance ran the car within 250 feet of the schoolhouse at a greater speed. The fourth count alleged that defendants negligently drove the car at a high and unreasonable rate of speed without giving any warning or signal of its approach. The defendants pleaded not guilty.

Counsel for defendants urge as grounds for a reversal of the judgment (1) that the evidence clearly shows that the accident was caused by the contributory negligence of the deceased; (2) that the court erred in submitting said schoolhouse speed ordinance to the jury and in instructing them thereon because the ordinance is invalid; (3) that the court erred in giving certain other instructions and in refusing to give others; and (4) that the court erred in its rulings on the admissibility of certain evidence. In the view we take of the case it will only be necessary for us to consider counsel's first point.

The evidence discloses in substance the following facts: Belmont avenue is an east and west street, and defendants' double street car tracks are laid thereon. Eastbound cars are propelled by electricity over the south track and westbound cars over the north track. On the south side of Belmont avenue and extending east from Lincoln street, a north and south street, for a distance of about 219 feet is the yard or property of the Jahn school, on the east of which yard stands the school building. The school property is enclosed by a fence. There is an entrance gate on the corner of Belmont and Lincoln, and another gate, called the second or middle gate, opening from Belmont, at a point 89 feet east of said corner. The entire school building is east of said second gate. In the middle of the north wall of the building, which stands about 20 feet south of the fence, is an entrance to the building, called the "Boys Entrance." There is no gate in the fence east of said second gate. The sidewalk on the

south side of Belmont, immediately north of the fence and extending to the south curb of Belmont, is of the width of 13 feet. From the south curb to the south rail of the eastbound track the distance is 13 feet and 6 inches. From the outside of the south rail of the eastbound track to the outside of the north rail of the westbound track the distance is 15 feet and 6 inches. Said tracks are of the ordinary guage and the distance between them is the ordinary distance. On the north side of Belmont avenue and opposite the boys entrance to the schoolhouse is a millinery store; immediately east thereof is a private dwelling; east of that is a vacant lot; and said buildings and lot are each of the width of 25 feet. The street car involved in the accident is number 1161. On a previous trip it had shown disorder in its electrical appliances in that, because of a loose armature band, when the car was run at a speed in excess of about 5 miles per hour, the overhead switch would "blow." The car was on its return to the car barns for repairs and was being driven by a repair-man, accustomed to act as a motorman. He and his helper were the only persons on the car. The brakes were in first class condition. There was snow on the ground and the rails were slippery. Plaintiff's intestate was a little over nine years of age, was a bright boy and had been attending the Jahn school for over three years. Sometimes he went to school alone and sometimes with his sister. His eyesight was good and his hearing normal. Just prior to the accident he and two other boys were playing a game of tag. All three had run out on the sidewalk from the school yard at the second or middle gate, and one boy, named Copp, being in the lead, ran east on the sidewalk and then across the street in a northeasterly direction and reached the vacant lot. The 8oth boy, being chased by the third boy, named Beeglin, also ran east along the sidewalk for a short distance and then suddenly started to cross the street, also in a northeasterly direction, immediately

[illegible] side of Sugaman, immediately north of the river and [illegible] to the south side of Bodkin, is at the width of 12 feet. From the north side to the south 1.12 of the [illegible] [illegible] the distance is 12 feet and 2 inches. From the middle of the south half of the mentioned track in the middle of the north half of the mentioned track the distance is 12 feet and 2 inches. Dark stones are of the ordinary shape and distance between them is the ordinary distance. On the north side of Sugaman [illegible] the type existing in the [illegible] is a military [illegible]; immediately next thereof is a [illegible] [illegible] in a [illegible] and with [illegible] and [illegible] of the [illegible] of 12 feet. The street car involved in the [illegible] Dark Lake. On a previous trip it had shown disorder in its [illegible] or distance; in that, because of a loose [illegible] [illegible] the car was run at a speed in excess of about 4 miles per hour, the evidence being with "them." The car was on its proper side of the car tracks for repairs and was being driven by a [illegible] [illegible] in car in a [illegible]. On the [illegible] the only persons on the car. The [illegible] was in front [illegible] [illegible] car came on the ground and the [illegible] [illegible] [illegible]'s [illegible] was a little over nine years of age, was a [illegible] [illegible] had been attending the [illegible] for over three years. [illegible] to [illegible] alone and [illegible] with his [illegible] [illegible] was good and his hearing normal. [illegible] in the [illegible] and two other boys were playing a game of tag. [illegible] [illegible] out on the sidewalk from the school yard to the [illegible] of middle gate, and one boy, named [illegible], ran to the land, [illegible] on the children and then turned the corner in a [illegible] [illegible] and vanished the second [illegible]. The [illegible] boy, being chased by the third boy, named [illegible], when the first place [illegible] the [illegible] distance and then suddenly [illegible] [illegible]

in front of the approaching eastbound street car, which possibly he did not see. At the same time an automobile was approaching from the east, a short distance away, its two left wheels running between the rails of the westbound track and the other wheels north of said track. This automobile the Roth boy evidently saw, and may have caused him either to stop, or step back. About this instant he was first struck by the rounding bumper near the northeast corner of the street car, knocked down, and probably in falling his head came in violent contact with other parts of the car. None of the front wheels passed over him. When the street car was stopped the boy was lying in the street north of the front part of the rear trucks of the car and about opposite the millinery store. The testimony is conflicting whether, in his advance across the street, he was first struck by the car before he had completely cleared it, or whether he was struck after he had stopped or had stepped back. He died almost instantly. The speed of the street car after crossing Lincoln street and immediately before the collision was not much in excess, if at all, of 5 miles per hour. When the boy suddenly left the sidewalk and started to run across the street there was nothing to prevent his seeing the approaching street car had he glanced towards the northwest. The moterman testified that he saw him as he started running diagonally across the street about 10 feet east of the car, that he rang the bell, threw the power off, set the brakes, and reversed the car, and that after the collision the car "slid maybe 20 or 30 feet." Boeglin, the boy who was chasing the Roth boy and who did not leave the sidewalk but continued running east, testified that when the Roth boy left the curb, running fast, the car was only about 8 feet to the west of him.

The case is somewhat similar in its facts to those in the Roberts case (262 Ill. 228) where plaintiff's intestate, a man of mature years, was held guilty of contributory negligence, barring

a recovery, in attempting to cross double street car tracks between street cars approaching from opposite directions, and where, as the court said (p.231), the question whether he exercised ordinary care was to be determined "not by the probabilities when he left the sidewalk, but rather by the situation when he reached the tracks and attempted to cross between the approaching cars when the street was clear and there was no obstruction to the view and no necessity for making the attempt." Plaintiff's intestate at the time of the accident was slightly over nine years of age. We understand it to be the law of this state that a child over seven years of age is bound to exercise ordinary care for one of his age, intelligence, capacity and experience. (Chicago City Railway Co. v. Touhy, 196 Ill. 410, 423; Lake Erie & Western R. Co. v. Klinkrath, 227 Ill. 439, 441; Burke v. Chicago City Ry. Co., 153 Ill. App. 388, 392.) And that boys of about the age of plaintiff's intestate in the instant case, and of his intelligence, capacity and experience, may be guilty of such contributory negligence as to bar a recovery for injuries sustained. (Moehler v. Chicago City Ry. Co., 166 Ill. App. 371, 375; Wilson v. Chicago City Ry. Co., 133 Ill. App. 433, 437.)

Our conclusion is that under the facts disclosed plaintiff cannot recover on account of the contributory negligence of his intestate, and that the judgment of the Circuit Court must be reversed.

REVERSED WITH FINDING OF FACT.

Barnes and Morrill, JJ., concur.

333 - 26507

FINDING OF FACT.

We finding as an ultimate fact in this case that at and before the time of the accident in question plaintiff's intestate, Richard Roth, was guilty of contributory negligence proximately causing his death.

46 - 26681

ALANSON C. NOBLE, Complainant and Cross-Defendant, CHICAGO, TITLE & TRUST COMPANY, Individually and as Receiver, and ARCHIBALD A. McKINLEY and JOHN M. DUFFY, Cross-Defendants,

Defendants in Error,

vs.

QUIN O'BRIEN, Defendant and Cross-Complainant,

Plaintiff in Error.

ERROR TO

CIRCUIT COURT,

COOK COUNTY.

224 I.A. 652

STATEMENT BY THE COURT. This writ of error is sued out by Quin O'Brien, defendant and cross-complainant, to reverse a final decree of the Circuit Court of Cook County, entered October 18, 1920, in favor of Alanson C. Noble, complainant and cross-defendant, wherein it was adjudged that O'Brien pay to Noble the sum of $7,376.24, with lawful interest thereon from date of the decree until paid, and two-thirds of the costs.

The cause was commenced on August 27, 1914, by the filing of a bill for an accounting by Noble, and on April 22, 1916, was referred to a master to take proofs and report his conclusions. After the introduction of much evidence, both oral and documentary, the master, on August 29, 1918, filed his report. After a hearing upon exceptions the court entered a so-called interlocutory decree, confirming the master's report, finding that the equities were with Noble and that he was entitled to an accounting, fixing the basis of the accounting, and re-referring the cause to the same master to state the account. In the decree the court expressly retained jurisdiction of the cause to control and enforce the accounting, to change or modify the principles upon which it was ordered to be taken, to determine the costs and to enter a final decree. O'Brien moved that he be allowed to appeal from the decree but the motion was denied. On

No. - 3821

BRATTON C. JOHNS, Complainant
and Drew-Defendant, Cross-
Libel & Petition Claimant, Individually
and as Receiver, and MUNICIPAL &
MORTGAGE and JOHN E. DUTCT, Cross-
Defendants.

Defendants in Error,

vs.

JOHN O'BRIEN, Defendant and Cross-
Complainant,

Plaintiff in Error.

STATEMENT OF THE CASE. This writ of error is sued out by John O'Brien, defendant and cross-complainant, to review a final decree of the circuit Court of Cook County, entered October 16, 1930, in favor of Bratton C. Johns, complainant and cross-defendant, wherein it was adjudged that O'Brien pay to Johns the sum of $7,[illegible], with legal interest thereon from date of the decree until paid, and the costs of the cause.

The cause was commenced on August 27, 1924, by the filing of a bill for an accounting by Johns, and on April 23, 1926, was referred to a master to take proofs and report his conclusions. After the introduction of much evidence, both oral and documentary, the master, on August 22, 1929, filed his report. After a hearing upon exceptions the court referred a so-called interlocutory decree, modifying the master's report, finding that the equities were with Johns and that he was entitled to an accounting, fixing the basis of the accounting, and referring the cause to the same master to state the accounts. In the decree the court expressly reserved jurisdiction of the cause to control and enforce the accounting, to change or modify the principles upon which it was ordered to be taken, to determine the costs and to enter a final decree. O'Brien moved that he be

May 6, 1920, on Noble's petition, the court entered an order finding that the cross-defendant, Chicago Title & Trust Co., holds in escrow a certain fund belonging jointly to Noble and O'Brien, appointing said company receiver of the fund, and ordering it to pay to itself as such receiver the fund with accrued interest, less $100 allowed to it by the parties. On May 10, 1920, the court entered an order allowing the master $1500 to apply on account of his fees under the orders of reference and re-reference, in addition to the amount allowed him by order entered July 30, 1918, and in addition to the $350 theretofore advanced him by the parties, and directing the receiver to pay him said sum of $1500 out of the fund in its hands, and further ordering that the final allowance of fees of said master, and the taxation of costs thereon, as between the parties, be deferred until the entry of the final decree. O'Brien objected to both orders. After the hearing before the master on the re-reference, at which much additional evidence both oral and documentary was introduced, the master, on May 17, 1920, filed his second and final report in which he stated the account between the parties, made many specific findings, and found in conclusion, (1) that at the date of the filing of Noble's bill of complaint (August 27, 1914), O'Brien was indebted to Noble in the sum of $5,299.25; (2) that Noble was entitled to interest on said sum at the rate of 5% per annum from the date of the filing of his bill, and that there was due Noble at the date of the master's report the total sum of $6,759.25; (3) that Noble and O'Brien were each entitled to a one-half interest in the escrow fund held by the receiver, less its fee of $100; (4) that any interest in said escrow fund which might exist in favor of the cross-defendant, Archibald A. McKinley, was included in O'Brien's share thereof, and (5) that the equities of the case were with Noble, and that the cross-bill of John M. Duffy should be dismissed for want of equity. On May 19, 1920, the court ordered that the respective objections

filed by Noble and by O'Brien to the master's report stand as exceptions thereto. On July 14, 1920, O'Brien filed his written motion that the court modify the interlocutory decree of March 24, 1919, so as to change the principles upon which the accounting was had. On July 30, 1920, the master filed an amended certificate of his services and charges, to which O'Brien filed objections. On the same day the court entered an order fixing and allowing the master's fees at the sum of $5,300.98, "taxed as costs herein," and finding that the master had been paid $2,850 of said fees, and ordering that the receiver pay the master out of the money in its hands the sum of $2,450.98, said order to be without prejudice to the awarding of costs, the court to retain jurisdiction to tax in its final decree the master's fees equitable between the parties. O'Brien objected to this order. On October 18, 1920, the receiver filed its final report, showing that on July 31, 1920, it had paid to the master said sum of $2,450.98, and that it had a balance on hand of $289.12, out of which it asked that it be allowed as its fees the sum of $25. The court approved the report and allowed the receiver said amount, and on the same day, October 18, 1920, entered the final decree in question, to which a more particular reference will hereafter be made.

In Noble's amended bill of complaint it is alleged in substance that in the year 1905 both Noble and O'Brien were attorneys at law, practicing their profession principally in the city of Chicago; that Noble's practice was largely devoted to chancery causes and that O'Brien was engaged in other lines of legal work, particularly in the trial of jury cases; that during said year Noble employed O'Brien to assist him in the trial of a certain case which Noble had taken on a contingent fee and which they finally won; that thereafter O'Brien proposed that Noble assist him in certain of his cases other than tort cases, and thereafter he brought to Noble's office certain cases upon which

Noble worked, and that, although there had been no agreement as to a division, "the fees in all of said cases when received were divided equally;" that early in the year 1907 O'Brien suggested to Noble that the latter move his office into the suite occupied by O'Brien in the Unity building, Chicago, and assist O'Brien in certain other cases, particularly mentioning a case in connection with the Schramm estate, which case O'Brien had taken on a contingent fee, and that "he led your orator to believe" that he would deal fairly with him and "would divide all fees evenly with him" that might be recovered in said case as well as in all other cases that they might handle together; that pursuant to the suggestions, Noble, in the spring of 1907, moved his office into O'Brien's suite, and that during said year and thereafter he not only worked upon his own matters, but also upon said Schramm case and other of O'Brien's cases; that because of his former dealings with O'Brien he "believed that all net fees that might be received in all matters they might handle together would be equally divided between them;" that he prepared and filed two bills in chancery in the Schramm litigation and did much arduous work in connection with said litigation; that in the year 1910 a compromise settlement of that litigation was made and O'Brien received fees in excess of $14,000, but failed to account with Noble as to any part thereof until December 24, 1910, when he paid Noble the sum of $700 and promised a full settlement in the near future, but which he did not make; that Noble continued his office association with O'Brien in said suite until the spring of 1912, when they removed to a suite in the Otis building, Chicago, and there remained until May 1, 1914, when O'Brien moved his office; that during the time they were together in the Unity building Noble had a number of cases in which O'Brien assisted in the trial thereof, and that whenever fees were received in such cases the net fees were equally divided between the parties, or accounted for on that basis, and that

O'Brien also had a number of minor equity and contract cases wherein Noble assisted, and that the net fees were likewise divided or accounted for equally, and that "it was the general understanding throughout the entire course of dealings between them that the net fees in all matters wherein they assisted each other should be divided equally;" that after the parties removed to the Otis building, Noble, having frequently and without success demanded accountings in certain cases, began to realize that O'Brien did not intend to come to any settlement with him on the basis of an equal division of fees, and thereafter O'Brien stated to him that, as regards O'Brien's cases in which Noble had assisted, he (O'Brien) would not pay Noble one-half of the fees received, but would pay him only such amount as he (O'Brien) considered that Noble's services were reasonably worth; and that finally Noble offered to submit to arbitration the question as to whether said fees should be divided equally, but that O'Brien refused the offer, and refused to make any fair settlement or any accounting. The bill then sets forth the details as to a large number of cases in which the parties were associated together as attorneys, and prays for an accounting, an injunction and a receiver.

In O'Brien's answer it is denied in substance that there was ever any agreement or understanding between the parties that the fees received in those of O'Brien's cases in which Noble assisted should be divided equally, or that fees were ever so divided in any such cases. It is alleged in substance that before Noble moved into the Unity building suite he was fully compensated for all his services rendered in O'Brien's cases, and in all instances received sums which were less than one-half of the net fees in each case; and that Noble moved his office into said suite under the express verbal agreement with O'Brien that he (Noble) was to receive the amount of his office rent and expenses in said suite as his compensation for such services as he would render O'Brien in the latter's chancery and contract cases, and that in

all of Noble's cases in which O'Brien assisted as counsel or trial attorney O'Brien was to receive one-half of the net fees. The answer sets forth in detail the actions of the parties as to many cases. O'Brien also filed a cross-bill against Noble and others praying for affirmative relief, to which answers were filed.

In the master's first report he found in substance that for about two years prior to May 1, 1907, when Noble moved his office into the Unity building suite, Noble had O'Brien try some of his cases and O'Brien had Noble assist him in the preparation and trial of some of his cases; that about May 1, 1907, a verbal agreement was made between the parties, whereby beginning May 1, 1907, each was to render legal services for the other when called upon; that in pursuance of said agreement each rendered services to the other until shortly after the month of May, 1912, upon legal business controlled by the other, for which services each is justly and equitable entitled to be paid out of the net fees received; that "no fixed basis of compensation was agreed upon by said parties;" that each has received fees on cases upon which the other worked; that in the latter part of the year 1910 differences arose between the parties regarding finances and the adjustment of their accounts which finally resulted in the commencement of the present litigation; that there has been no complete settlement or accounting between them and they should be required to account each to the other for fees received in which they rendered services jointly; that only the basis of such accounting need now be determined; that O'Brien, "having alleged and relied upon a specific contract on the question of compensation, different from that set up and alleged by the complainant, thereby assumed the burden of proving the special compensation agreement," and that "he has failed to establish the same by a preponderance of the evidence;" that O'Brien has paid out moneys for Noble's office expenses in the Unity and Otis buildings which Noble is obligated to repay to him; and that any accounting had between the parties should include not only the net fees re-

of the present litigation; that there has been no complete settlement

ceived on certain cases, but also moneys advanced, expended or loaned, each for or to the other, and all other transactions involving money claims. And the master found, in conclusion, that Noble and O'Brien "must be held to have been engaged on such cases as joint undertakings or joint ventures in the nature of a limited or special partnership, and the proof not being sufficient to establish any special contract or agreement of the parties, definitely fixing the basis for the division of the fees acquired or earned, they should as a matter of law be required to divide the net fees received by either of them on the enumerated cases, share and share alike." And the master recommended that an order be entered finding that each of the parties is entitled to an accounting from the other "for one-half of the net fees received by each of them respectively upon litigated cases and other legal matters upon which each rendered service at the request of the other," and that for that purpose they be directed to present their respective accounts to a master.

The court in said interlocutory decree of March 24, 1919, made a number of specific findings, some of which are to the effect that O'Brien has pleaded a special agreement made with Noble as an affirmative defense to the cause of action as pleaded by Noble, and seeks to have that alleged agreement specifically enforced, but that the evidence does not establish or prove any such special agreement as alleged by O'Brien; that there was no agreement, as alleged by Noble, existing between him and O'Brien, relative to the division of the profits and losses derived from or incurred in the various matters and suits which are subject to an accounting between said parties, but that "the division of the profits and losses in said matters should be fairly and equitably divided, and * * that such division is fixed by law upon the basis of share and share alike;" and that -

"The court finds that said parties worked together jointly in the various litigated cases and matters handled by them as joint ventures or undertakings, each case or matter so handled by them, whether known as an 'O'Brien' case or whether known as a 'Noble' case, was handled as a separate joint venture or undertaking, with no definite agreement between them as to the division of profits or sharing of losses in any such case or matter, and that the law fixes the division of profits and sharing of losses in each such case share and share alike; and that * * the profits should have been divided in each such case or matter between the parties as soon as and at the time the same was received, and the losses shared as soon as the same were ascertained."

In the court's final decree mention is made of O'Brien's motion that the court modify its interlocutory decree of March 24, 1919, so as to change the principles on which the accounting before the master was had. The modification suggested was that the amount of the fees which O'Brien should be responsible for, and should account to Noble, in all of the causes and matters enumerated in said interlocutory decree, should be a sum equal to the total aggregate amount of Noble's office rent and expenses in the Unity building suite from May 1, 1907 to April 30, 1912, in accordance with the contract between Noble and O'Brien as set forth in the latter's answer and cross-bill, "or, in the event that this court will not find and hold that said contract was proven, or holds that it does not govern the accounting, then and in that event that the court find (and modify the decree accordingly) that the fees which the defendant shall be responsible for and to account to complainant in each and all of said enumerated cases and matters is the fair and reasonable value of complainant's services on said cases and matters, based on the usual and customary proportion of the total gross fees paid complainant by this defendant, and by complainant received, in full for his services on this defendant's cases and matters other than those so enumerated in said decree, to-wit, the cases McCrumhey v. Hogan; Stolze v. Stolze; Kane v. Globe Insurance Co., and Gilliland v. Spiegel House Furnishing Co." The court in said final decree denied the motion and ordered and adjudged that said interlocutory decree be re-affirmed, and further adjudged that

In the court's final course modifies in made of O'Brien's
[illegible] that the court modify the injunctionary decree of March 24,
[illegible], so as to change the principles on which the accounting before
the master was had. The modification requested was that the amount
of the fees which O'Brien should be responsible for, and should
account in brief, in all of the cases and matters mentioned in
the injunctionary decree, should be a sum equal to the total
[illegible] amount of brief's office rent and expenses in the daily
[illegible] period from May 1, 1907 to April 30, 1914, in proportion
with the relative between Brief and O'Brien as set forth in the
[illegible]'s answer and cross-bill. For, it is urged that this court
will not find and hold that a mere accounting was proper, or that the
[illegible] does not govern the accounting, that not is that course that the
court find (and modify the decree accordingly) that the fees which
the defendant should be responsible for and be ordered to account in
[illegible] and all of said associated cases and matters in the trial
court reasonable value of complainant's services on said cases and
matters, based on the usual and customary recuperation of the social
[illegible] fees paid complainant in this matter, and by complainant
[illegible], in fact the services on this defendant's [illegible] and
[illegible] other cases be considered in said decree. Finally, the
[illegible] Richmond v. Pomeroy, supra v. Jackson, supra v. Cedar Lumber
[illegible], and Billings v. Central Trust Corporation.* The court is
of that course, denied the motion and overruled and adhered that

all of Noble's and O'Brien's several exceptions to the master's final report (except certain enumerated exceptions of O'Brien's which were sustained) be overruled and that the master's final report, except in the particulars mentioned, be confirmed. The court found that it was unnecessary to re-refer the cause to the master to re-state the account, as varied in said particulars, and re-stated the account, as so varied, in an itemized form in said decree, in which the court found that there was due from O'Brien to Noble, in certain of O'Brien's cases, on the basis of an equal division of the net fees, the total sum of $9,283.97; and that there was due O'Brien from Noble for certain moneys paid out by O'Brien for Noble, for Noble's office expenses, for the so-called Duffy deficit, and for certain net fees, based on an equal division thereof, in certain of Noble's cases, the total sum of $4,288.31; and that there was due to Noble from O'Brien at the date of the filing of Noble's bill the difference between said two total sums, or the net sum of $4,995.66. And the court further found that Noble was entitled to interest upon said net sum of $4,995.66, at the rate of 5% per annum from August 27, 1914, (the date Noble's bill was filed) to the date of entry of this decree, or the further sum of $1,533.99, making a total sum of $6,529.65 then due Noble on said accounting. And the court further found that there had been in the hands of the receiver certain moneys, arising from certain funds deposited in escrow and which were involved in the accounting, amounting to the net sum of $4,240.10, of which Noble and O'Brien were each entitled to one-half; and the court found that $3,950.98 of this amount had been paid, under orders of court previously entered, to the master on account of his fees, and that there remained in the receiver's hands, after allowing to it $25 as a fee, the sum of $264.12. And the court further found that two-thirds of all costs of the suit should be paid by O'Brien, including the

master's fees and for transcript of the testimony furnished the master; that the transcript of evidence was necessary to the trial and adjudication thereof; that the costs of such transcript should be fixed at $1,284.30; that Noble is entitled to recover from O'Brien all sums paid by Noble in excess of $428.10 (Noble's share of said transcript), being the sum of $157.65 as part of the costs, Noble having paid the sum of $585.75 for the master's stenography. And the court further found that the master's fee had heretofore been fixed at the sum of $5,300.98; that Noble had advanced to the master $600 and O'Brien $750; that the balance of the master's fee, or $3,950.98, had been paid the master out of funds in the receiver's hands belonging jointly to Noble and O'Brien; that Noble's share of said master's fee, as above fixed at one-third thereof, is $1,766.99; that he had paid direct to the master said sum of $600, leaving a balance due to him on this accounting of $1,166.99, which was paid out of his said share of said escrow fund; that, after deducting the sum of $264.12, so remaining in the receiver's hands, from Noble's share of said escrow fund of $2,120.05, there remains the sum of $1,855.93; that, after deducting the said sum of $1,166.99 from said sum of $1,855.93, being the amount paid from said Noble's share to the master, there remains the sum of $688.94 which sum said Noble is entitled to recover from said O'Brien personally. And the court further found that Noble was entitled to recover from O'Brien, as a money judgment, the following sums:

Principal	$4,995.66
Interest thereon from August 27, 1914, at the rate of 5% per annum to this date	1,533.99
Transcript furnished the master, over and above Noble's share (1/3 of which would be $428.10)	157.65
Excess paid the master out of Noble's share of said escrow fund by the receiver	688.94
Total	$7,376.24

market'd find and for [illegible] of the [illegible] [illegible] the market; that the [illegible] of [illegible] was necessary to the [illegible] and [illegible] [illegible]; that the [illegible] of [illegible] should be fixed at £1,384.00; that Robie is entitled to recover from O'Brien all sums paid by Robie in excess of £108.32 (Robie's share of said transcript), being the sum of £137.00 on part of the basis, Robie having paid the sum of £225.75 for the master's [illegible], and the court further found that the master's fee had heretofore been fixed at the sum of $2,500.00; that Robie had advanced to the master [illegible] and O'Brien £130; that the balance of the master's fee, or $1,370.00, had been paid the master out of funds in the receiver's hands belonging jointly to Robie and O'Brien; that Robie's share of said master's fee, or above first of one-third thereof, is $1,756.00; that he had paid direct to the master said sum of $800, leaving a balance due to him on this accounting of $1,156.00, which was paid out of his said share of said escrow fund; that, after deducting the sum of $384.12, as remaining in the receiver's hands, from Robie's share of said escrow fund of $2,180.00, there remains the sum of $1,811.88; that, after deducting the said sum of $1,156.00 from said sum of $1,811.88, being the amount paid from said Robie's share to the master, there remains the sum of $655.88 which sum said Robie is entitled to recover from said O'Brien personally. And the court further found that Robie was entitled to recover from O'Brien, in a money judgment, the following sums:

Principal	$1,655.88
Interest thereon from August 17, 1911, at the rate of 6% per annum to this date	1,414.84
Disbursements included the master's fee and above Robie's share ($1,756.00) which should be $1,800.00)	124.44
Interest paid the master out of Robie's share at said escrow fund by the receiver	111.84
Total	$3,306.96

And the court ordered and decreed that the receiver forthwith pay to Noble the said sum of $264.12, so remaining in its hands as the balance of said escrow fund belonging to Noble, and that upon such payment being made the receiver be discharged. And the court further ordered and decreed that O'Brien pay Noble within 15 days the sum of $7,376.24, with lawful interest thereon from this date until paid, "and also two-thirds of the costs of this suit to be taxed by the clerk of this court (other than the master's fee and the stenographer's fee heretofore taxed and adjusted as above), and in default of such payment that execution issue therefor;" and that the cross-bill of John M. Duffy be dismissed for want of equity.

and the money argument and insured that the receiver invariably
came to stalk the cold man of [illegible], as remaining in the hands
of the balance of such winner that belonging to [illegible], and that
[illegible] (cheaper) having made the instinct be [illegible]. and
the story further asserted and insured that [illegible] g-r [illegible]
[illegible] 11 days the sum of $7,[illegible], with [illegible] [illegible]
[illegible] that [illegible] goal, [illegible] [illegible] of the week. [illegible]
[illegible] goal to be [illegible] by the [illegible] of [illegible] [illegible] [illegible]
[illegible]'s [illegible] and the [illegible]'s [illegible] [illegible]
[illegible] to [illegible], and [illegible] of [illegible] [illegible] [illegible]
[illegible] [illegible]" and that the [illegible] of [illegible]. [illegible]
[illegible] for [illegible] of [illegible].

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On the record filed in this appellate court O'Brien has assigned many errors and Noble has assigned many cross-errors. To the cross-errors assigned O'Brien filed three pleas to the effect that said cross-errors had been waived or released. To these pleas Noble filed replications, and to the replications to the second and third pleas O'Brien filed demurrers. These demurrers should be overruled and the clerk of this court will enter an order to that effect. In view of the conclusions we have reached, as hereinafter stated, after a review of the abstract of the entire record in this case, we deem it unnecessary to further discuss the pleadings here filed, except to say that we do not think that said cross-errors were waived or released.

Counsel for O'Brien first contend as a ground for a reversal of the decree, that the basis of the accounting fixed by the court is erroneous, in that it is shown by a clear preponderance of the evidence that, as alleged in O'Brien's answer, at or prior to May 1, 1907, when Noble moved his office into the Unity building suite, the parties verbally agreed that Noble was to receive the amount of his office rent and expenses in said suite as his compensation for such services as he, when requested, would render O'Brien in the latter's cases, and that in all of Noble's cases in which O'Brien rendered services as counsel or trial attorney as requested the latter was to receive one-half of the total net fees. There is no dispute between the parties as to what proportion of the net fees O'Brien should receive in Noble's cases. Noble stated on the hearing before the master: "I admit that in my cases, which I called O'Brien into, that O'Brien would be entitled to one-half of the net fees." The main dispute concerns O'Brien's cases. The court in the interlocutory decree, following the first report of the master, found in substance that the evidence did not establish

Mr. Prosecutor, please ADVISE Defendant THE DEFENSE OF THE COURT.

In the second Count in this indictment there is charged the defendant Jack Smith and Smith the notorious Bank-robbery. In the Mississippi-Indiana O'Brien Trial there plays in the street that said Bank-robbery has been solved or released. In these place Smith Trial Negligence, and in the testimonies in his second and third place O'Brien Trial Conspiracy. These Conspiracy should be performed and the class of this Bank will raise or deter in this effort. In view of the considerations in mind for Negligence Bank robbery, which a feature of the Contract of the Bank robbery in this case, we deem it unnecessary to further discuss the pleadings Bank Trial, except to say that we do not think that the crimes were waived or released.

Counsel for O'Brien Trial contend on a person for a personal of the Bank, that the Judge of the Commercial Trial by the court in errorneous, in that it is shown by a clear preponderance of the evidence that, as alleged in O'Brien's answer, at or prior to Sep 1, 1947, some Bank Robbers entered into the Trial Building and, the position verbally agreed that Smith was to receive the amount of his office work and expenses in each month in the consideration for such services to be, just rendered, while Smith O'Brien in the Latter's Office, and that in fit of Bank's Robbery in which O'Brien received evidence to Defend in total Liability of Negligence the Latter was to receive one-half of the total net fees. There is no dispute between the parties as to what proportion of the net fees O'Brien should receive in Smith's Trial. Under which as has been stated before the evidence: "I which fees in my name, which I believe O'Brien Bank, that O'Brien would be entitled to one-half of the net fees." The main dispute concerns O'Brien's Trial, the court in the Commercial Trial, including the fees income of

or prove any such special agreement as alleged by O'Brien, and that no special verbal agreement was entered into, as alleged by Noble in his amended bill, to the effect that in all of O'Brien's cases, in which he rendered services for O'Brien there was to be an equal division of the net fees. After a careful examination of the evidence we are unable to say that it was shown by a clear preponderance of the evidence that, as to O'Brien's cases, the agreement was that Noble as compensation for his services in such cases was to receive only his office rent and expenses.

Counsel for O'Brien secondly contend that, even if it be held that the special agreement as alleged by O'Brien was not sufficiently proved, still the decree is erroneous in awarding an equal division of the net fees in such of O'Brien's cases as are stated in the master's account, because in several of O'Brien's settled cases, not enumerated in said master's account and in which Noble rendered services, Noble knowingly accepted in full settlement for his services in each of said cases about one-fourth, or less, of the net fees received, which acts on Noble's part preclude the presumption that the net fees received in all of O'Brien's cases in which Noble rendered services should be divided equally. The court in the interlocutory decree, following the master's first report, found in substance that the parties worked together in the various cases enumerated in the master's account (whether known as an "O'Brien" case or as a "Noble" case), that each case was a joint venture or undertaking, with no definite agreement as to the division of profits or losses, and that "the law fixes the division of profits and sharing of losses in each such case share and share alike." It appears that prior to the entry of the final decree O'Brien moved that the court modify the principles on which the accounting before the master had before been directed to be taken; that one of the modifications suggested was that if the court should hold that the express contract as

alleged by O'Brien, had not been proved, then and in that event that the court should so modify the interlocutory decree that the amount of fees which O'Brien should be held liable to account to Noble for, in each and all of said enumerated cases of O'Brien's, should be the fair and reasonable value of Noble's services in each such case, based on the usual and customary proportion of the total fee which had been paid Noble in each of four of O'Brien's cases mentioned and in which a final settlement as to fees had been made between the parties. The court denied O'Brien's motion and re-affirmed the interlocutory decree as to the basis fixed for the accounting. It appears from the evidence, regarding said four settled cases, that after Noble had moved his office into the Unity building suite and prior to May 22, 1908, a period of about one year, he received from O'Brien fees in each of said cases in full for his services and for his share of the total net fees received; that two of said cases were McCaughey v. Hogan and Stolze v. Stolze, which were finally settled on September 12, 1907; that in the McCaughey case the total net fee received by O'Brien was $150, and he gave Noble and the latter received in full settlement for his share $25, or 1/6th thereof; that in the Stolze case the total net fee received by O'Brien was $250, and he gave Noble and the latter received in full settlement for his share $35, or about 1/7th thereof; that the third of said cases was Kane v. Globe Ins. Co., which was finally settled as to fees on May 18, 1908; that in this case the total net fee received by O'Brien was $170, and he gave Noble and the latter received in full settlement for his share $50, or less than 1/3rd thereof; that the fourth of said cases was Gilliland v. Spiegel House Furnishing Co., which was finally settled as to fees on May 21, 1908; and that in this case the total net fee received by O'Brien was $200, and he gave Noble and the latter received in full settlement for his share $50, or 1/4th thereof. It thus appears that during a period of over one year after Noble

alleged by O'Brien, had not been proved, then and in that event that the court should so modify the interlocutory decree that the amount of fees which O'Brien should be held liable to account to Noble for, in each and all of said enumerated cases of O'Brien's, should be the fair and reasonable value of Noble's services in each such case, based on the usual and customary proportion of the total fee which had been paid Noble in each of four of O'Brien's cases mentioned and in which a final settlement as to fees had been made between the parties. The court denied O'Brien's motion and re-affirmed the interlocutory decree as to the basis fixed for the accounting. It appears from the evidence, regarding said four settled cases, that after Noble had moved his office into the Leahy building suite and prior to May 31, 1948, a period of about one year, he received from O'Brien fees in each of said cases in full for his services and for his share of the total net fees received; that two of said cases were Robertson v. Chase and Lilly v. Alston, which were finally settled on September 13, 1947; that in the Robertson case the total net fee received by O'Brien was $150, and he gave Noble and the latter received in full settlement for his share $25, or 1/6th thereof; that in the Lilly case the total net fee received by O'Brien was $250, and he gave Noble and the latter received in full settlement for his share $50, or about 1/5th thereof; that the third of said cases was [illegible] v. [illegible], which was finally settled as to fees on May 17, 1948; that in this case the total net fee received by O'Brien was $175, and he gave Noble and the latter received in full settlement for his share $50, or less than 1/3rd thereof; that the fourth of said cases was Hilliard v. Capitol [illegible] Transportation Co., which was finally settled as to fees on May 31, 1948; and that in this case the total net fee received by O'Brien was $100, and he gave Noble and the latter received in full settlement for his share $20, or 1/5th thereof. It

moved his office into said suite, when final settlements as to fees were made between the parties in certain of O'Brien's cases in which Noble had rendered services, such settlements were not made on the basis of an equal division of the total net fees received, but on the basis that Noble was entitled to receive as his share of the fees what O'Brien considered Noble's services were reasonably worth, and which share did not exceed on the average 1/4th of the net fees received. We do not think, under these circumstances and other facts and circumstances in evidence, that the court was justified in fixing as a basis for the accounting that, in those O'Brien cases enumerated in the master's account and in which Noble rendered services without any definite agreement with O'Brien as to what compensation he should receive, the total net fees received in each such case should be divided equally between the parties. The master in his first report reached the conclusion that the parties must be held to have been engaged in such cases "as joint undertakings or joint ventures in the nature of a limited or special partnership," and that in the absence of any special agreement as to a division of the fees "they should as a matter of law be required to divide the net fees * * share and share alike." Under the circumstances disclosed we do not understand that such is the law. In 30 Cyc. p. 451, it is said: "The profits of a partnership are to be divided equally between the partners, however unequal may be their contributions of capital or of services, in the absence of an agreement express or implied to the contrary, or unless some fact or circumstance exists from which it may be inferred that the partners intended that the profits should be divided in unequal proportions." See also Fleischman v. Gottschalk, 70 Md. 523, where there was no express agreement as to the division of the profits of the business and the claim for an equal division was denied the claimant even though called a "full partner," and where the court stated (p.529) that the terms of the partnership

could "only be inferred from the statements and conduct of the parties in relation to the business," and held that the presumption of law, that an equal division of the profits should be made, was "not an irresistible one; if the circumstances in any particular case show that the partners did not so intend, and must be fairly supposed to have intended the contrary, the presumption of law must yield to the presumption of fact." See, also, Phenix Ins. Co. v. McKenzie, 38 Ill. App. 630. We are of the opinion under all the evidence that the basis of the accounting as to the net fees in the O'Brien cases, enumerated in the master's report, should have been so fixed as to award Noble one-quarter of said fees, instead of one-half, and that the final decree of October 18, 1920 should be reversed, and the cause remanded with directions that the account be re-stated and modified accordingly.

Counsel for O'Brien also contend (1) that the court erred in allowing interest on the net sum of $4,995.66, found to be due Noble from O'Brien, from August 27, 1914, (the date Noble filed his bill) to the date of the entry of the final decree; (2) in taxing two-thirds of all the costs including the master's fees against O'Brien, and (3) in fixing and allowing the master's fees at the total sum of $5,300.98.

We agree with all three contentions. As to the allowance to Noble of the sum of $1,533.99 for interest we think that this was improper under all the facts in evidence, and that in the re-statement of the account no interest should be allowed either party. As to the taxing of the costs, including the master's fees, we think that on the re-statement of the account they should be taxed equally between the parties. As to the sum allowed the master for his fees we think that it was excessive. It appears from the court's order fixing and allowing the master's fees, entered July 30, 1920, nearly three months before the entry of the final decree, that the court found that under the first reference of April 22, 1916, the master

[illegible] be inferred from the statements and conduct of the [illegible] in relation to the business," and hold that the proceedings of the [illegible] equal division of the profits should be made, was not in [illegible] any of the circumstances in the [illegible] made show that the partners did not be intent, and must be taken [illegible] in view between the [illegible], the proceedings of the [illegible] made in the proceedings of [illegible]." See, also, Jones Bros. Co. v. Gardner, 59 Ill. App. 600. In one of the opinions cited, the [illegible] that the basis of the accounting as to the net loss in the "Dixie Store", concerned in the master's report, should have been [illegible] to be sound upon one-quarter of such loss, instead of [illegible], and that the final decree of October 31, 1958 should be [illegible], and the cause remanded with directions that an accounting [illegible] and conducted accordingly.

Counsel for defendant also contend (1) that the court erred [illegible] allowing interest on the net sum of $4,[illegible], found to be due [illegible] from August 27, 1954, (the date upon which [illegible] in the death of the mother of the final decree; (2) in [illegible] [illegible] of all the assets including the mother's free [illegible] "Dixie", and (3) in fixing and allowing the mother's fees in the [illegible] sum of $[illegible].

We agree with all these contentions. As to the allowance [illegible] of the sum of $[illegible] for interest we think that [illegible] [illegible] value all the final decree, and that in the [illegible] of the accounts an interest should be allowed without [illegible] to the trustee of the estate, including the [illegible]. We think [illegible] of the investments of the account they should be never [illegible] [illegible] the partner. As to the sum allowed the mother for her fees [illegible] that it was excessive. It appears from the master's report [illegible] and allowing the mother's fees, received July 31, 1958, merely [illegible] matter before the entry of the final decree, that the court [illegible]

(1) has taken and certified 4500 folios of testimony, for which the statutory fee to be allowed him is 15 cents per folio, or $675; (2) has received in evidence and certified as exhibits 19,783 words, for which at said statutory rate there should be allowed him the sum of $29.68; (3) that pursuant to an order of court certain letters, papers, checks, books and documents were impounded with the master which it became necessary for the parties from time to time to examine, and, as neither would permit an examination except in the master's presence, the master was required to be present at such examinations on 16 different days for the aggregate time of 45 hours, and he should be allowed a fee therefor at the rate of $6 per hour, or the sum of $270; (5) that for his services in hearing motions, examining files, and hearing oral arguments he has expended 50 hours in time, for which he should be allowed a fee at the same rate or the sum of $300; (6) that the master was required to and did devote 41 days of 6 hours each in reviewing the testimony, considering authorities, examining exhibits, hearing arguments on objections and preparing his first report, for which services he should be allowed a fee at the same rate, or the sum of $1,476; that under the order of re-reference, entered March 24, 1919, said master (7) has taken and certified 3692 folios of testimony and is entitled to the statutory fee of 15 cents per folio or the sum of $553.80; (8) has received in evidence and certified as exhibits 350 folios and is entitled therefor to the sum of $52.50; (10) that he was required to be present, at various times while the parties were examining the impounded papers and documents, for the aggregate time of 12 hours and should be allowed a fee at the rate of $6 per hour, or the sum of $72; (11) that he has devoted 15 hours hearing arguments on the interlocutory decree and attending arguments before the court, for which he should be allowed a fee at the same rate, or the sum of $90; (12) that he has devoted 18 hours examining statements of accounts and motions and objections thereto, for which he should be allowed a fee at the same rate, or the sum

of $108; (13) that he has devoted 9 hours to hearing arguments at the conclusion of the proofs for which he should be allowed at the same rate the sum of $54; (14) that he has devoted 270 hours reviewing the testimony, considering the exhibits and portions of the former record, examining authorities, hearing arguments and considering objections and should be allowed at the same rate per hour the total sum of $1,620; (15) that for the services mentioned in the above paragraphs, Nos. 1, 2, 7 and 8, the fees are fixed by statute, and that the services mentioned in the remaining paragraphs were imposed by the orders of reference and re-reference, and that the fees allowed therefor as above stated are reasonable; that, therefore, the master is allowed as statutory fees, as itemized in said paragraphs Nos. 1, 2, 7 and 8, the sum of $1,310.98, and is further allowed for his services as itemized in the remaining paragraphs the sum of $3,990, "for which no specific fee is provided by statute," and that the total amount so allowed as master's feesis $5,300.98. We think that the allowance of the items, aggregating $1,310.98, and contained in said paragraphs Nos. 1, 2, 7 and 8, is proper, but that the additional aggregate sum of $3,990, allowed the master for his services as itemized in said remaining paragraphs, is too large under all the facts and circumstances, and should be reduced onethird, or to the sum of $2,660, making the total amount $3,970.98 to be allowed to the master as his proper fees up to and including the date of the final decree, October 18, 1920. And in the restatement of the account and the re-adjustment of costs this change should be made, and, as the master has been paid said sum of $5,300.98, he should be ordered to return $1,330 thereof to the clerk of the Circuit Court or other custodian as directed by the court, and subject to future disposition as ordered in the new decree to be entered.

Counsel for O'Brien further contend that the court erred in sustaining the master's account, wherein O'Brien was not allowed certain credits in certain enumerated cases, and certain expenses.

and wherein Noble in certain other cases was allowed certain credits. The matters involved are very intricate, but we are unable to say after careful consideration that the court erred as to any of these matters.

Our conclusion is that the decree of the Circuit Court should be reversed and the cause remanded with directions that the account be re-stated and modified in all of the particulars above mentioned; and that except as to these particulars that the accounting stand; and that, after said account has been so re-stated, that a new decree be entered accordingly.

REVERSED AND REMANDED WITH DIRECTIONS.

Morrill, J., concurs.

MR. JUSTICE BARNES:

I concur in all conclusions except in fixing the value of Noble's services in O'Brien's cases at a definite ratio. No two of the four settled cases were adjusted on such ratio or the same ratio. I do not think there is sufficient evidence to warrant the conclusion that the numerous unsettled cases were to be adjusted on the basis of a similar percentage, regardless of the nature, character and reasonable value of the services rendered therein. Without proof of the reasonable value of such services I do not think an equitable and just accounting can be had.

147 - 26806
169 - 26828

JOHN BEYER,
Complainant and Appellant,

vs.

PETER KEMPE, KAREN LARSEN,
individually and as administratrix
of the estate of PAUL LARSEN,
deceased, and MATTIE LARSEN,
Defendants and Appellees.

CONSOLIDATED APPEALS
FROM CIRCUIT COURT,
COOK COUNTY.

224 I.A. 652

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

Each of these appeals were taken by John Beyer, one from a final decree of the Circuit Court of Cook County, entered December 31, 1920, and the other from a separate order of that court, entered on the same day and just prior to the entry of said decree, appointing a receiver to take possession of all the property and assets of the co-partnership of F. Kempe & Company, etc. The cause was commenced on December 16, 1916, by said Beyer filing a bill for an accounting of the affairs of said co-partnership (consisting of said Beyer, Peter Kempe and Paul Larsen) which had been engaged in the cut stone business in Chicago since 1875, and had been dissolved by the death of Larsen, December 17, 1915. After the cause was at issue it was referred to a master in chancery who, after taking evidence, made his report. When the order and the final decree were entered, following a hearing upon exceptions, the court considered only the pleadings and the master's report, no other evidence being introduced.

The principal controversy is between Beyer and Kempe as to the right of the former to receive interest on balances to his credit in the partnership books at various times during its existence. Beyer relied on an alleged agreement of the partners that he was to receive interest at 5% per annum and testified that there was an agreement to that effect. Kempe denied that

there ever was such an agreement. Certain entries appearing in the partnership books and claimed by Beyer to have a bearing upon the question were introduced in evidence. The master made no definite finding as to whether there was or was not an agreement to pay interest. He found that the parties got together at irregular intervals during the existence of the partnership, the first time on December 31, 1887, and stated their accounts, and when so severally stated showed balances in favor of Beyer and overdrafts on the part of Kempe. He allowed interest to Beyer on these balances as struck on the theory that they were accounts stated and drew interest as a matter of law. The chancellor on the hearing disallowed interest on the balances except as to the balance existing in favor of Beyer at the date of the dissolution, December 17, 1915. The master also held that Kempe should be charged with interest on said over drafts. He recommended that the amounts, which he found due from Kempe and from the estate of Larsen to the partnership "be ordered paid to the master, or to a receiver to be appointed by the court." No objections were filed by Beyer to the master's report.

In the decree the court ordered and adjudged that all exceptions to the master's report which related to the allowance of interest to Beyer as set forth in that report, and to the charging of interest against Kempe, be sustained, and that all other exceptions be overruled. The court found <u>inter alia</u> that in or about the year 1875, Beyer, Kempe and Paul Larsen entered into the partnership, that each was to receive one-third of the profits of the business and to share one-third of the losses, that the partnership continued until December 17, 1915, when it was dissolved by the death of Larsen, who left him surviving Karen Larsen, his widow, and Mattie Larsen, his adopted daughter, his only heirs at law and next of kin, and that Karen Larsen

had been duly appointed administratrix of his estate and was acting as such; that Kempe was custodian of and handled all the money of the business and that the affairs of the partnership were in an unsettled condition; that out of the proceeds and funds of the business the partnership had acquired certain enumerated pieces of real estate, some of which were encumbered by a trust deed; that the title to said real estate was taken in the individual names of the partners for the use and benefit of the partnership; that the estate of Paul Larsen, deceased, is indebted to the partnership in the sum of $783.33, and certain interest; that Peter Kempe is indebted to the partnership in the amount of $6,856.45, together with interest thereon at 5% from December 17, 1915, the date of the dissolution of the firm, which said interest is $1,714.11, making a total of $8,570.56; that the partnership is indebted to Beyer in the same amount, together with interest at thesame rate from the same date; and that the assets of the partnership consist of the real estate above mentioned, certain personal property located thereon, and the said indebtedness due from Kempe and the Larsen estate. And the court further found that -

> "there was no agreement between said partners, or any of them, that interest should be paid by partners whose accounts were overdrawn, or that interest should be allowed to partners who did not draw the amounts to which they were entitled, or who permitted part of their share of the profits to remain in the co-partnership; and that there were no accounts stated between said partners, or anything else done from which the law would imply an obligation on the part of the co-partnership to pay interest to the complainant (Beyer) from any date prior to the date of the dissolution of the co-partnership, or on the part of the defendants to pay interest to the co-partnership from any date prior to the date of the dissolution of said co-partnership."

And the court ordered and decreed <u>inter alia</u> that Kempe pay within 30 days to the receiver, said sum of $8,570.56, together with interest thereon at 5% from the date of the entry of this decree to the date of payment; that Karen Larsen, individually and as said administratrix, and Mattie Larsen, or one of them,

pay to said receiver within 30 days said sum of $783.33, together with certain named interest; that, in the event of the failure to said defendants or either of them to pay said respective sums and interest, their respective shares in the assets of the partnership be charged with said sums and interest until paid; that the receiver, out of the moneys coming into his hands, after making payment of the balance of costs and expenses of the receivership, first pay to Beyer said sum of $8,570.56, together with interest thereon at 5% from date of this decree to the date of such payment; and that Beyer recover from Kempe his costs including the amount of the master's fees.

The sole contention made by counsel for Beyer for a reversal of the decree is that the court erred in sustaining Kempe's exceptions to the master's report and disallowing interest on the balances due Beyer prior to the dissolution of the partnership. Under the facts disclosed and under the law we deem the contention to be without merit. We understand it to be the law that interest is not allowed on balances remaining in the partnership by a partner where there is no agreement between the partners for the charging of interest. (Gage v. Parmelee, 87 Ill. 329, 334.) The court found that no such agreement was shown in the present case. We think that the finding is sufficiently supported by the evidence. And we think that the court properly found that there were no accounts stated between the partners, or anything else done from which the law would imply an obligation either on the part of the partnership or Kempe to pay interest to Beyer on the balances due him from time to time prior to the dissolution of the partnership. The evidence does not disclose that Kempe was guilty of any misappropriation of the partnership funds at any time. (Snell v. Taylor, 182 Ill. 473, 479.)

Counsel for Beyer also contends that the court erred in appointing a receiver and in making such appointment in an

order separate from the final decree. We think that under the facts disclosed the appointment of a receiver was proper. And it is difficult to perceive how Beyer was prejudiced because the order of appointment was made in a separate order immediately prior to the entry of the decree, rather than in the decree.

The decree of the Circuit Court is affirmed and the order appointing the receiver is also affirmed.

AFFIRMED.

Barnes and Morrill, JJ., concur.

169 - 26828

JOHN BEYER,
Complainant and Appellant,

vs.

PETER KEMPE, KAREN LARSEN,
individually and as
administratrix of the estate
of PAUL LARSEN, deceased,
and MATTIE LARSEN,
Defendants and Appellees.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

224 I.A. 652

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

For the reasons indicated in the opinion this day filed in case No. 26806, bearing the same title as above, the order of the Circuit Court of Cook County, entered December 31, 1920, appointing a receiver to take possession of all the property and assets of the co-partnership of P. Kempe & Company, etc. is affirmed.

AFFIRMED.

Barnes and Merrill, JJ., concur.

269 - 26930

LEO EDELMAN,
Appellee,

vs.

WILLIAM PEARCE,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

224 I.A. 652

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for $1000 rendered against defendant after verdict by the Circuit Court of Cook County in an action for damages for personal injuries sustained by plaintiff, occasioned by his being struck and knocked down by defendant's automobile on the north side of Washington street (an east and west street) between Clark and LaSalle streets, in the City of Chicago. The action was commenced on January 26, 1915. It was twice dismissed for want of prosecution, twice re-instated, and finally came on for trial in November, 1920. The accident happened about 5 o'clock in the afternoon of September 3, 1914, during the usual congestion of traffic at that hour in the "loop" district of the city.

Plaintiff's declaration consisted of four counts. The first count charged that, while plaintiff was lawfully in and upon Washington street and was in the exercise of ordinary care and caution for his own safety, defendant so carelessly and negligently drove, managed, and controlled said automobile in a westerly direction on said street that it collided with and ran upon and over plaintiff, whereby he suffered serious injuries. The second, third and fourth counts charged respectively that defendant negligently drove said automobile "without sounding any alarm or signal contrary to law and the statute;" "without keeping any outlook to discover the presence of plaintiff in Washington street;" and "in an incompetent and inexperienced manner."

Defendant filed a plea of the general issue. In the three last mentioned counts there is no allegation that plaintiff was in the exercise of due care for his own safety. Defendant's motions for a new trial and in arrest of judgment were both overruled. In our opinion the first count is the only one upon which the verdict can be sustained, if at all. (Sher v. Robinson, 220 Ill. App. 365, 367; Walters v. City of Ottawa, 240 Ill. 259, 266; Sargent Co. v. Baublis, 215 Ill. 428, 431.) It is urged by counsel for defendant that the evidence is insufficient to sustain the verdict and judgment either upon the question of due care upon plaintiff's part or the question of defendant's negligence.

It appears from the evidence in substance that plaintiff was in the employ of a taxicab company, acting as a chauffeur of one of its cabs; that about 4.45 o'clock on the afternoon of the accident he drove his cab from the company's garage to a place on the north side of Washington street about 100 feet east of LaSalle street; that when the cab stopped it was facing west and so standing that the right wheels thereof were about one foot from the north curb; that other cabs were standing in like positions near said curb and to the west of his; and others afterwards came and took similar positions to the east of his; that these cabs stood there waiting for customers during "the evening rush;" that between the standing cabs, including plaintiff's, there were spaces to allow passage between and to facilitate the movement of the cabs when required; that there were double street car tracks on Washington street, west bound cars moving on the north track; that the distance between the north rail of said track and the north curb was about 15 feet; and that immediately before and at the time of the accident there were two lines of traffic moving west in Washington street, between Clark and LaSalle street, - one, consisting of street cars, automobiles and other vehicles, "tracking" in the north track, and the other, consisting of automobiles, including defendant's,

[illegible] Plant a plan of the general issue. In the lower last [illegible] towards there is no allegation that plaintiff was in the [illegible] of her own for his own safety. Defendant's motions for [illegible] were vital and in effect of judgment were much overruled. In our opinion the first count is the only one upon which the verdict can be sustained, if at all. (Ohio v. Johnson, 208 Ill. App. 301, 307; [illegible] v. City of Chicago, 144 Ill. 188, 194; Illinois Cent. R. [illegible] 111. App. 401.) It is argued by counsel for defendant that the evidence is sufficient to sustain the verdict and judgment either upon the question of due care upon plaintiff's part or the question of defendant's negligence.

It appears from the evidence in substance that plaintiff was in the employ of a banking company, acting in a capacity of [illegible] at the date, that about 4.30 o'clock on the afternoon of the accident he leave his job from the company's place to a place on the north side of Wabashaw street about 50 feet east of Dearborn street; that when the cab stopped it was driving east at a moderate speed the right wheels thereof were about one foot from the curb; that where cabs were standing in line proceeding east and in the west of this; and others efforts were not such similar positions to the east of this; that there was ample room for passing the motorcycle during "the critical period" that plaintiff was crossing the sidewalk, including plaintiff's. Some said driver is alleged because between and to fortifiers the movement of the right wheel; [illegible] that there were double parked cars towards on Dearborn street, and behind cars moving in the opposite direction; that the distance between the curb wall of said street and the north side of said [illegible]; and that immediately before the time of the accident there were the lines of traffic moving east in Washington street, between State and Dearborn streets, - the, consisting of street cars, automobiles and other vehicles. "Jaywalking" is the term used,

and other vehicles, moving between said track and the standing cabs.

As to the details of the accident plaintiff and another witness testified in plaintiff's behalf. This other witness, named Ellison, was a fellow chauffeur, in charge of a cab of the same company, which cab at the time was standing either immediately west or immediately east of plaintiff's. Defendant was the only witness who testified in his behalf as to how the accident happened. He was alone in the automobile at the time. Another witness, a court reported named Julian, testified for defendant. He was called for the purpose of impeaching certain testimony given by plaintiff and Ellison, and he testified from his shorthand notes to certain statements made by them in a trial had in the Municipal Court of Chicago in November, 1914, involving the same accident.

Plaintiff testified in substance that after he stopped his cab on the north side of Washington street he got out of the north entrance of the cab onto the sidewalk and first talked with a fellow chauffeur and then looked over his cab to see if it was all right; that he had been there about ten minutes when the accident happened; that he was then standing out in the street about a foot south of his cab, facing west; that possible he was "stooping down" at the time; that "all of a sudden I got struck, and didn't know anything any more;" that he did not remember what traffic was passing at the time and that he "was not paying any particular attention to anything but my car." Ellison testified in substance that when plaintiff was struck he (Ellison) was standing in the street between two cabs, about a cab's length west of plaintiff, and facing east, "the way the line of traffic was coming;" that when he first saw defendant's automobile "it was practically ready to strike Edelman;" that "either the right front fender or wheel" struck him and knocked him down, and the "right front wheel passed over him between his hips and shoulders;" that at that time Edelman was walking west

alongside of his cab and facing west; and that defendant's automobile was moving at the rate of about 15 miles per hour. On being asked if he had not previously testified in the Municipal Court that defendant's automobile was going "at the rate of 5 or 7 miles an hour" he replied that he did not remember, and further testified that he was not sure as to the speed and that it was going "at a moderate rate of speed, the same as any other traffic that comes along." From the testimony of the court reporter, Julian, it appeared that the witness had testified in the Municipal Court that defendant's automobile was going at the time "probably at the rate of 5 or 7 miles an hour." As shown by plaintiff's witness, Dr. Friend, who examined and treated plaintiff shortly after the accident, the latter's injuries consisted of a sprain of the right wrist, a fracture of the left wrist, and a sprain of the right ankle. This physician found no marks or bruises on plaintiff's body between his hips and shoulders.

Defendant testified in substance that on the afternoon in question he was driving his automobile west on Washington street; that after he passed Clark street he was moving west at the rate of about 5 miles per hour in the line of traffic between the standing cabs and the other line of westbound traffic moving in the north car track; that just ahead of him was a truck and just beside him and to his left was a street car; that it was "close driving," as his automobile was only about one foot from the standing cabs on his right and the street car on his left; that suddenly plaintiff, facing southwest, ran out between two of the standing cabs, and the fender which covered the right front wheel of the automobile struck him and he "fell back;" and that defendant stopped his automobile within about two feet.

We are of the opinion that under all the facts and circumstances disclosed the defendant was not guilty of negligence warranting a recovery of any sum as damages. Furthermore, we think that plaintiff was guilty of negligence which proximately caused

his injuries. According to defendant's version of the accident plaintiff suddenly ran from a place of safety in about the middle of a block right into the path of moving traffic which he saw or should have seen. According to plaintiff's version he was either in a standing or stooping position in a place of danger because of the moving traffic, and was not looking in the direction from which that traffic was approaching. Under either version he was not in the exercise of due care for his own safety.

Our conclusion is that the judgment of the Circuit Court must be reversed and it is so ordered.

REVERSED WITH A FINDING OF FACTS.

Barnes and Merrill, JJ., concur.

his injuries. Something in automobile sensing of the accident plaintiff suddenly ran from a place of safety in front the middle of a block right into the path of moving traffic which he saw or should have seen. According to plaintiff's version he was either in a standing or stooping position in a place of danger between or two moving trains, and was not looking in the direction from which that traffic was approaching. Under either version he was not in the exercise of due care for his own safety.

Our conclusion is that the judgment of the lower court must be reversed and it is so ordered.

ATTORNEYS WITH A VIEW TO PLACE.

Sitters and Barrill, JJ., concur.

269 - 26930

FINDING OF FACTS.

We find as ultimate facts in this case that at and immediately before the time of the happening of the accident in question the defendant, Pearce, was not guilty of the negligence charged against him, and that at said time the plaintiff, Edelman, was guilty of negligence which proximately caused the injuries sustained by him.

31 - 26346

CHARLES G. BURMEISTER,
doing business as
C. Burmeister and Son,
Defendant in Error,

vs.

HERMAN SCHWARZ,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

2 24 I.A. 653

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This suit was brought by defendant in error, an undertaker, for services rendered and miscellaneous articles furnished for the funeral and burial of one Schwarz, the father of plaintiff in error,(the defendant) who appears to have died intestate. There was some evidence in the record tending to show that he left $1,000 for his widow to be used in the payment of his debts. Under section 70 of the statute on administration of estates funeral expenses are placed in the first class as charges against a decedent's estate. Primarily, therefore, the estate was liable for the funeral expenses, and defendant was not liable unless the expenses were incurred upon his credit, or he for a valuable consideration agreed to pay them, neither of which the evidence tends to show. Even if he agreed to pay them for the estate the agreement, not being in writing, could not be enforced against his plea of the statute of frauds.

But we find nothing in the record to indicate a promise on the part of Herman Schwarz to pay the funeral expenses. It appears that plaintiff was first called to decedent's house to care for the body and make funeral arrangements by a son-in-law of deceased, and that the widow, defendant and other relatives afterwards accompanied the undertaker to the establishment where

the casket was selected. Defendant's liability is predicated mainly on the contention that while there the undertaker warned against the selection of too expensive materials, and defendant said, "Never mind, we will give the old man a good send-off. I have got to pay the bill and I will spend it." Defendant denied making such statement, and the witness so testifying said when asked if defendant said anything as to who was to pay for the funeral: "Well, he didn't in exact language. He didn't say that he was supposed to pay anything, but I was told later on that the bill was for him to pay." While it appears that defendant was active with other members of the family in selecting the casket and different articles for the funeral, and that "they were advising him not to go too high, not to take too expensive stuff," we fail to find sufficient proof in the record of any promise by defendant that he would take care of the funeral expenses or anything upon which to support plaintiff's claim against him alone. Accordingly the judgment must be reversed with a finding of fact.

REVERSED WITH FINDING OF FACT.

Gridley, P. J., and Morrill, J., concur.

31 - 26346

FINDING OF FACT.

We find that the materials and professional services furnished by defendant in error as an undertaker, as alleged in his statement of claim, were not furnished at the special instance and request of Herman Schwarz, plaintiff in error, and that the latter entered into no contract individually to pay for the same.

207 - 26380

MYRTLE MILLER,
Appellee,

vs.

S. S. KRESGE COMPANY,
a corporation,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

224 I.A. 653

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for $11,000 entered against appellant (defendant below) in a personal injury suit. Defendant owned and operated a department store in the City of Chicago. Plaintiff had gone there as a patron to make some purchases. While there on October 30, 1916, walking over the floor she stepped on a slippery substance, fell and was injured.

One of the questions is whether the action was barred by the statute of limitations. It was presented both upon defendant's motion for a directed verdict made at the close of the evidence and by the motion in arrest of judgment. Both were overruled.

The original declaration was filed September 4, 1918. A general demurrer thereto was sustained July 12, 1919. An amended declaration was filed July 12, 1919, and hence more than two years from the time of the injury when, of course, the statute began to run. The statute of limitations was pleaded to the declaration to which plaintiff filed a replication in general terms, not setting forth any fact that prevented the running of the statute. The amended declaration states, and the undisputed proof is, that the date of the injury was October 30, 1916. There was no attempt to bring before the jury any state of facts that took the case out of the statute. The lapse of the statutory period being unquestioned it follows

that the cause of action was barred, unless the original declaration, which in the consideration of either of said motions the court was bound to inspect, stated a cause of action and the amended declaration was a mere restatement or amplification thereof. If it did not state a cause of action then the amended declaration set up a new cause of action and was barred by the statute. (Bahr v. National Safety Deposit Co., 234 Ill. 101; 25 Cyc. p. 1309)

The original declaration, after stating generally the failure of defendant to use ordinary care to maintain its floors and aisles in a reasonably safe condition for passage thereon, which averment amounted to a mere conclusion, charged as the only fact of negligence that "defendant suffered and permitted a certain object or substance to then and there be and remain upon said floor," of which it had knowledge, and alleged that plaintiff while walking upon said floor slipped or fell over said object or substance, by reason whereof she was injured, etc. Presumably the general demurrer to this declaration was sustained because it did not state a cause of action. Plaintiff sought to cure the same in the amended declaration by inserting after the quoted words, in the first count, "to-wit: grease, oil, soap or other substance of a similar character" and, in the second count, "to-wit: a slippery substance."

These very modifications suggest, if they do not admit, the absence of an essential element from the original declaration. It certainly would not constitute negligence that defendant suffered and permitted any kind of a substance, in no way described, to be and remain on the floor of the store when from the very nature of its business it might be expected that some substances would be placed thereon, at least in certain parts of the store. No negligence or breach of duty to its patrons was stated in the

that the cause of action was barred, making the criminal violation, which in the commission of claims of said actions the court was bound to inquire, absent a waiver of notice and the amended complaint was a mere amendment or modification thereof. It did not create a claim of action that the medical malpractice was up a new cause of action and was barred by the statute. (Lane v. Kaiser Foundation Hospital Jr., 104 Cal. App. 2d Cal. 2d, 2d Dist.)

The original complaint, after alleging generally the failure of defendant to use ordinary care in treating the Plaintiff and alleged in a reasonably safe condition for proper further medical attention provided to a more non-liable, charged in the only that of negligence that "defendant negligently and proximately a suitable splint or bandages in them and there be not remain such fact," of which it had knowledge, was aware that the plaintiff was suffering with extreme pain and was crying when right splint or bandages, by reason whereof the was injured, and. Presumably the general demurrer to this particular was sustained because it did not state a cause of action. Plaintiff sought to cure the error in the amended complaint by inserting after the quoted words, in the first count, "health crying, oil, soap or other substance of a similar nature", in the second count, "provide a different substance".

Under very multifarious circumstances, it may be not clear, the absence of an essential element from the original complaint, it totally omit the ultimate negligence that defendant and permitted any kind of a medication, in no way described, he be and remain on the floor of his room from the very nature of the injuries it might be expected that some complaint would be placed therein, or injure in certain parts of the state. To medicaments or bandage of some in the medical use likely to the

mere fact that it had "a certain substance" on the floor, even though plaintiff slipped or fell over it. Without an averment from which it might be implied that the substance was of a character and in a place to endanger the safety of patrons where they might be expected to walk, no cause of action was stated. It is fundamental that in such an action the declaration must state facts from which the law must raise a duty. (Mahr v. National Safety Deposit Co., supra; Schueller v. Mueller, 193 Ill. 402.) It is apparent that the original declaration failed in this respect and therefore did not state a cause of action. Hence the amended declaration stated a new cause of action which was barred by the statute. Accordingly the court should have granted the motion for a directed verdict, and failing to do so, the motion in arrest of judgment. Either error calls for a reversal of the judgment.

In this view of the case it is unnecessary to consider appellant's contention that the amended declaration is equally defective. If that were the only error urged, we would be disposed to hold that its defects are such as were cured by verdict.

Upon a review of the evidence on a rehearing we are not prepared to say that the verdict was manifestly against the weight of the evidence, although sitting as jurors we might have found that it was not proven to our satisfaction that the substance on which plaintiff slipped came there through defendant's failure to exercise ordinary care, or that it had been there sufficiently long to put defendant on notice. Plaintiff was injured about noon. Up to that time the store was crowded; but nobody else appears to have slipped on the floor. Plaintiff testified that her heel struck something slippery or greasy; that she saw a streak where her heel had slipped about eighteen inches long and one inch wide which appeared darker than the rest of the floor. One of her sisters said that the floor

around there "looked like it was newly oiled and at this place it was some thicker; that there was a mark about a foot long as if something had slid; that at the place where this streak was it looked like oil, like any oiled wood." Another sister, and one of defendant's employes testified substantially to the same appearance. Another employe testified that the floor was oiled every Saturday; that where plaintiff fell "there was a blotch of oil; * * * a streak where she fell." The accident happened on Monday. Another employe testified that the floors in the basement where plaintiff slipped were oiled two or three times a month. It is upon this evidence in substance, which had some tendency to show that there was a spot of unwiped oil on the floor, that plaintiff predicates her claim of negligence.

While defendant introduced evidence to the effect that the floors were new and had not been oiled before the date of the accident, it appears that after it began oiling the floor it was the uniform practice and custom to have the basement floor swept four times a day, at 9:30 and 11:30 in the morning and 2:30 and 5:30 in the afternoon; that said sweeping took about three-quarters of an hour, and that the floor had been swept just before the accident. Assuming that defendant had oiled the floors the previous Saturday, yet that is not inconsistent with plaintiff's slipping on something that was dropped on the floor by some one in the crowd.

As urged by defendant, it was bound to exercise only ordinary care to see that its floors were safe for passage. It was not an insurer of plaintiff's safety, and had a right to oil its floors if done in a manner that did not render them unsafe for its patrons. There was evidence, however, from which the jury might infer that the floor was oiled on the previous Saturday night, and that a spot of oil was left unwiped, thicker than that on the rest of the floor, which escaped the sweeping on Monday

forenoon before the accident, and on which plaintiff stepped and slipped. While recovery was denied on a very similar state of facts in the cases of Kipp v. F. W. Woolworth & Co., 135 N. Y. Supp. 646, and Spickernagle v. Woolworth & Co., 236 Pa. St. 496, which are cited by appellant and present very persuasive reasoning in support of its claim, yet we feel that the decision of the case should rest upon the law as above stated, which forbids a recovery, rather than on the evidence which at least presents debatable issues of fact. Accordingly the judgment will be reversed as a matter of law.

REVERSED.

Gridley, P. J., and Morrill, J., concur.

Plaintiff's Exhibit, and he which plaintiff showed and
claimed. While recovery was limited to a very similar class of
cases in the case of Ehrt v. Jacksonville R. Co., 137 U. S.
[illegible], and Jacksonville v. Jacksonville R. Co., 138 U. S. 479,
[illegible] cases by appellants and others very strongly pressing
on measure of life claim, yet it was not the decision of the Supreme
Court that upon the law on other matters, which furnish a precedent,
rather than on the evidence which is based previous judgments
[illegible] of fact. Consequently the judgment will be reversed on a
matter of law.

REVERSED.

[illegible] J. [illegible] and MARSHALL J. [illegible] dissent.

207 - 26380

MYRTLE MILLER,
Appellee,

vs.

S. S. KRESGE COMPANY,
a corporation,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for $11,000 entered against appellant (defendant below) in a personal injury suit. Defendant owned and operated a department store in the City of Chicago. Plaintiff had gone there as a patron to make some purchases. While there on October 30, 1916, walking over the floor she stepped on a slippery substance, fell and was injured.

One of the questions is whether the action was barred by the statute of limitations. It was presented both upon defendant's motion for a directed verdict made at the close of the evidence and by the motion in arrest of judgment. Both were overruled.

The original declaration was filed September 4, 1918. A general demurrer thereto was sustained July 12, 1919. An amended declaration was filed July 18, 1919, and hence more than two years from the time of the injury when, of course, the statute began to run. The statute of limitations was pleaded to the declaration to which plaintiff filed a replication in general terms, not setting forth any fact that prevented the running of the statute. The amended declaration states, and the undisputed proof is, that the date of the injury was October 30, 1916. There was no attempt to bring before the jury any state of facts that took the case out of the statute. The lapse of the statutory period being unquestioned it follows

This is an appeal from a judgment for $12,000 entered upon verdict (defendant below) in a personal injury suit. Irvington owned and operated a transbaseb stage in the city of Oshkosh. PLAINTIFF had gone there as a passenger to make some purchases. While there on October 28, 1921, walking over the floor she slipped in a slippery substance, fell and was injured.

One of the questions is whether the evidence was barred by the statute of limitations. It was presented both upon defendant's motion for a directed verdict made at the close of the evidence and by the motion in arrest of judgment. Both were overruled.

The original indictment was filed September 1, 1921. A general demurrer thereto was sustained July 12, 1921. An amended indictment was filed July 12, 1921, and twelve days from the date of the injury when, of course, the statute began to run. The statute of limitations was pleaded in the instrument in which plaintiff filed a replication to general terms, but nothing turns upon that that prevented the running of the statute. The amended indictment stated, and the multiplied proof is, that the date of the injury was October 28, 1921. There was no attempt to bring before the jury any state of facts that have the slip not at the chamber.

that the cause of action was barred, unless the original declaration, which in the consideration of either of said motions the court was bound to inspect, stated a cause of action and the amended declaration was a mere restatement or amplification thereof. If it did not state a cause of action then the amended declaration set up a new cause of action and was barred by the statute. (Bahr v. National Safety Deposit Co., 234 Ill. 101; 25 Cyc. p. 1309)

The original declaration, after stating generally the failure of defendant to use ordinary care to maintain its floors and aisles in a reasonably safe condition for passage thereon, which averment amounted to a mere conclusion, charged as the only fact of negligence that "defendant suffered and permitted a certain object or substance to then and there be and remain upon said floor," of which it had knowledge, and alleged that plaintiff while walking upon said floor slipped or fell over said object or substance, by reason whereof she was injured, etc. Presumably the general demurrer to this declaration was sustained because it did not state a cause of action. Plaintiff sought to cure the same in the amended declaration by inserting after the quoted words, in the first count, "to-wit: grease, oil, soap or other substance of a similar character" and, in the second count, "to-wit: a slippery substance."

These very modifications suggest, if they do not admit, the absence of an essential element from the original declaration. It certainly would not constitute negligence that defendant suffered and permitted any kind of a substance, in no way described, to be and remain on the floor of the store when from the very nature of its business it might be expected that some substances would be placed thereon, at least in certain parts of the store. No negligence or breach of duty to its patrons was stated in the

that the cause of action was barred, unless the original declaration, which in the consideration of either of said motions the court was bound to inspect, stated a cause of action and the amended declaration was a mere restatement or amplification thereof. If it did not state a cause of action then the amended declaration set up a new cause of action and was barred by the statute. (Duhr v. National Safety Supply Co., 224 Ill. 201; 24 Cyc. p. 1308)

The original declaration, after stating generally the failure of defendant to use ordinary care to maintain the floors and aisles in a reasonably safe condition for passage thereon, which averment, considered by a more reasonable, charged in the only case of negligence that "defendant maintained and permitted a certain object or substance in that aisle to be and remain upon said floor," of which it had knowledge, and alleged that plaintiff while walking upon said floor slipped or fell over said object or substance, by reason whereof she was injured, etc. Presumably the general demurrer to this declaration was sustained because it did not state a cause of action. Plainly enough to cure the same in the amended declaration by inserting after the quoted words, in the first count, "to-wit: grease, oil, soap or other substance of a similar character" and, in the second count, "to-wit: a slippery substance."

These very modifications suggest, if they do not admit, the absence of an essential element from the original declaration. It certainly would not reasonably negligence that defendant maintained and permitted any kind of a substance, in or not constituting, in an aisle on the floor of the store when from the very nature of its business it might be expected that some substance would be placed thereon, at least in certain parts of the store. The negligence or breach of duty of the defendant was related to the

mere fact that it had "a certain substance" on the floor, even though plaintiff slipped or fell over it. Without an averment from which it might be implied that the substance was of a character and in a place to endanger the safety of patrons where they might be expected to walk, no cause of action was stated. It is fundamental that in such an action the declaration must state facts from which the law must raise a duty. (Bahr v. National Safety Deposit Co., supra; Schueller v. Mueller, 193 Ill. 402.) It is apparent that the original declaration failed in this respect and therefore did not state a cause of action. Hence the amended declaration stated a new cause of action which was barred by the statute. Accordingly the court should have granted the motion for a directed verdict, and failing to do so, the motion in arrest of judgment. Either error calls for a reversal of the judgment.

In this view of the case it is unnecessary to consider appellant's contention that the amended declaration is equally defective. If that were the only error urged, we would be disposed to hold that its defects are such as were cured by verdict.

But we also think that the verdict was manifestly against the weight of the evidence. It was not definitely proved what the substance was on which plaintiff slipped, or how it came there, or whether it had been there sufficiently long to put defendant on notice. Plaintiff was injured about noon. Up to that time the store was crowded; but nobody else appears to have slipped on the floor. Plaintiff testified that her heel struck something slippery or greasy; that she saw a streak where her heel had slipped about eighteen inches long and one inch wide which appeared darker than the rest of the floor. One of her sisters said that the floor around there "looked like it was newly oiled and at this place it was some thicker; that there was a mark

about a foot long as if something had slid; that at the place where this streak was it looked like oil, like any oiled wood." Another sister, and one of defendant's employes testified substantially to the same appearances. Another employe testified that the floor was oiled every Saturday; that where plaintiff fell "there was a blotch of oil; * * * a streak where she fell." The accident happened on Monday. Another employe testified that the floors in the basement where plaintiff slipped were oiled two or three times a month. It is upon this evidence in substance that plaintiff predicates her claim of negligence.

While defendant introduced evidence to the effect that the floors were new and had not been oiled before the date of the accident, it proved what was not disputed, that it was the uniform practice and custom to have the basement floor swept four times a day, at 9:30 and 11:30 in the morning and 2:30 and 5:30 in the afternoon; that said sweeping took about three-quarters of an hour, and that the floor had been swept just before the accident. Assuming that defendant had oiled the floors the previous Saturday there is no proof that the oiling was done in an unusual and careless manner. No pool of oil or unusual condition of the floor was testified to. It is equally consistent with the evidence that something slipperywas dropped on the floor by some one in the crowd.

Defendant was bound to exercise only ordinary care to see that its floors were safe for passage. It was not an insurer of plaintiff's safety. Defendant had a right to oil its floors if done in a manner that did not render them unsafe for its patrons. There is nothing in the testimony to indicate that they were not oiled or cleaned in the usual manner. There is little in the evidence from which to infer negligence except that the floor had been previously oiled and plaintiff slipped on something that

-44-

looked like oil. It cannot be said to warrant the inference that there was a pool of oil thereon or such a quantity thereof as would put defendant on notice of its presence in its exercise of ordinary care to keep the floors free therefrom. Proof that the floor was oiled two days before and showed a darker spot or greater discoloration and a mark where plaintiff's heel slipped, was not enough, in our opinion, to show a want of ordinary care to keep the floors in a safe condition, it not being disputed that they were oiled in the usual manner and that the floors were swept four times a day. As said in a similar case, Spickernagle v. Woolworth & Co., 236 Pa. St. 496:

> "The plaintiff failed to show * * * that the substance used thereon was unusual or improper; that it was oiled in an improper manner; or that it was in any other or different condition than would result from proper oiling."

The case of Kipp v. F. W. Woolworth & Co., 135 N. Y. Supp., 646, presents an almost identical state of facts, and the language of the court with respect thereto is so appropriate, we quote at some length:

> "Whether this oil spot was merely a surface oiling, or whether there was a pool of oil does not appear in the evidence. But the fairest inference from the testimony is merely that the floor was greasy at that particular point. * * *
>
> "The entire floor must have been under the broom many times between the oiling and the happening of the accident. * * * There is absolutely no evidence that the defendant had made any pool of oil upon the floor, and there is not a particle of evidence that the condition described by the plaintiff had existed for one minute prior to her falling. So far as the evidence discloses, the oil (if it was oil) may have been poured on the floor, or leaked on the floor, from a can in the hands of any one of the many people who were concededly in and out of this store during the day, and there was clearly no warrant for permitting the jury to guess upon this question. * * *
>
> "It is difficult to spell out from plaintiff's testimony that there was anything more than a discoloration of a space on the floor with oil; but the fair inference from the evidence is merely that at this particular point the oil had not been as fully absorbed by the floor as was general, and there is no evidence that this was apparent to ordinary observation, or that there was anything which would naturally give notice to the defendant of an alleged dangerous condition."

looked like oil. It cannot be said to overrule the inference that there was a pool of oil thereon or such a reasonably obvious as would put defendant on notice of its presence in the exercise of ordinary care to keep the floors free therefrom. Proof that the floor was oiled two days before and showed a darker spot or greater discoloration and a mark where plaintiff's heel slipped, was not enough, in our opinion, in view of evidence as to keep the floors in a safe condition, to rebut defendant's contention that they were oiled in the usual manner and that the floors were mopped four times a day. As said in a similar case,

Grandstaff v. Dalsimer & Co., 164 Ky. 17, 180:

> "The plaintiff failed to show * * * that the substance used thereon was unusual or improper; that it was oiled in an improper manner; or that it was by any other or different condition than would result from proper oiling."

The case of Ellis v. K. W. Dalsimer & Co., 164 Ky. 17, 174, presents an almost identical state of facts, and the language of the court with respect thereto is so appropriate, we quote at some length:

> "Whether this oil spot was merely a surface oiling, or whether there was a pool of oil deep and square in the crevices. But the fairest inference from the testimony is merely that the floor was greasy at that particular point. * * *
>
> "The entire floor must have been under the frown many times between the oiling and the happening of the accident. * * * There is absolutely no evidence that the defendant had made any pool of oil upon the floor, nor there is not a particle of evidence that the employees assigned by the plaintiff had neglect for the slippery place in the flooring. So far as the evidence discloses, the oil (if it was oil) may have been spread on the floor, or leaked on the floor, from a can in the hands of any one of the many people who were necessarily in and out of this room during the day, and there was scarcely an moment for permitting the jury to guess upon this question. * * *
>
> "It is argument to speak out from plaintiff's testimony that there was sufficient more than a dim suspicion of a spot on the floor with oil, but the fair inference from the evidence is merely that it was particular point the oil had not been so fully absorbed by the floor as the others, and that it was greasy, and there is no evidence that this oil was spread by a negligent employee, or that defendant had neglected to keep the floor in a safe condition, or that it was not mopped four times a day."

The court holding that defendant had a right to oil its floor in the usual way and that it would not be liable simply because one slipped upon an oil spot unless it permitted pools of oil to form and had some notice of its dangerous condition, it reversed the judgment.

We think these statements of the facts and question of liability are clearly applicable to the case at bar.

The judgment will be reversed both upon the law and facts.

REVERSED WITH FINDING OF FACT.

Gridley, P. J., and Morrill, J., concur.

FINDING OF FACT.

We find that appellant, S. S. Kresge Company, did not through any negligence suffer or permit grease, oil, soap or any other similar or slippery substance to be and remain on the floor of its store as charged in the declaration filed herein.

440 - 26614

FRANKLIN LANDIS,
Appellee,

vs.

THE NOIR HOTEL COMPANY,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Appellee sued to recover commissions for services alleged to have been rendered to appellant in procuring a mortgage loan of $3,500,000. The case was tried without a jury. The judgment appealed from is for $70,000 in plaintiff's favor.

The questions were whether there was an agreement for plaintiff's services to procure a loan, and if so, whether (1) it was authorized by defendant; (2) whether there was an express arrangement for the amount of commission; (3) whether he was the procuring cause of the loan, and (4) whether, not being a licensed broker, he could recover on the contract.

Defendant, in 1916, operated the Morrison Hotel in Chicago and planned to erect an annex thereto of twenty-one stories. Its properties were covered by a mortgage (known as the Graham mortgage) for $2,000,000 to secure bonds to that amount, $800,000 of which were held in the Hibernian bank with which one Lewis (hereinafter referred to) was connected.

To raise money for the erection of the annex and other corporate purposes defendant had instituted a campaign to sell its preferred stock, which it conducted from the hotel with a force of twelve selling agents under two managers, and also by advertising in newspapers. By the first of July, 1916, it had effected sales of such stock of the par value of $600,000

and was trying to dispose of the remaining issue of $400,000. Plaintiff saw its advertisement and on July 6, 1916, called on H. C. Moir, defendant's president, bringing with him a letter he had received from defendant stating the terms on which the stock was sold and details with respect to the company's financial condition. An interview of less than half an hour was had between them. No one else was present. Their versions of that interview are at utter variance and irreconcilable. Plaintiff claimed he was then promised two and one-half per cent commission to effect a loan of three and one-half million dollars, of which two million were to be used in refunding the Graham bond issue, and Moir claimed that nothing whatever was said about refunding or a loan, but that the interview related wholly to the sale of such stock, the subject matter of the letter. The judgment is based upon the theory of an agreed compensation.

On the same day of the interview plaintiff brought Moir and one Brewer together for negotiations. He and Moir disagree as to what was then said with respect to a new bond issue. Brewer's testimony tends to support Landis, but whatever the propositions he dropped consideration of them after a day or two. Landis then procured an introduction to Bolger of the brokerage firm of Bolger, Mosser & Willeman, and immediately brought Bolger into an interview with Moir. As to what was then said and discussed Moir and Landis disagree, and Bolger's testimony tends to support Moir. In a day or two Bolger submitted the matter to his firm, and the next day notified Landis that his firm was not interested. While he states that Landis then remarked that Moir might possibly be interested in a bond issue, that matter does not appear to have been considered or to have become a subject of negotiation, either by said firm or said Moir, until September 19, 1916, when Bolger took up the matter directly with Moir, and without the intervention of Landis. A

written contract for a bond issue was three days later, September 22, entered into between defendant and Belger's firm, and the transaction was completed in November, when the trust deed securing the loan was recorded. Up to that time there had been no further negotiations either between Landis and Moir or between Landis and Belger, or the latter's firm. Landis seeing a published notice of the recording of the trust deed then presented himself before Moir and claimed compensation for putting the deal through.

In view of the utterly contradictory versions of the principals to these several interviews and the very meager and inconclusive corroboration to be found in the record we feel after a full and careful review of the entire record that the evidence is too unsatisfactory to support a judgment of such magnitude, and that but for error in excluding competent evidence more conclusive evidence would have been presented.

It seems hardly compatible with the ordinary course of business dealing in matters of such magnitude, when liability may be incurred for an amount of $91,000, as claimed by plaintiff, that the understanding with regard thereto should be left to the individual recollection of a casual conversation of less than half an hour between two persons who were utter strangers to one another, and that the president of a company that had been pursuing a more or less successful plan for three months to dispose of its preferred stock should be induced in that length of time by a mere stranger, without credentials or a record as a financial broker, to change the company's entire plan without submitting the matter to its board of directors, and would agree, without its express authorization, to pay a commission of two and one-half per cent for a loan of three and one-half million dollars, two millions of which were to be used to refund a mortgage not due and for the

refunding of which no provision had been made or apparently contemplated up to that time. It is too severe a strain on one's credulity in this commercial age to believe that a man competent to be at the head of such a corporation would proceed to bind it to so large an obligation in such a reckless fashion. There is no evidence whatever that Meir had been authorized by the directors to negotiate a loan and pay such a commission, or that the matter had at that time been considered by the board.

Nor is there evidence to support plaintiff's testimony that there was an agreement to pay him a specific compensation, and it is only by accepting his word against Meir's on that point that a judgment for such amount could be sustained.

When we look through the record for support of plaintiff's version of the several interviews it seems to rest on very weak evidence. Brewer was a long-time acquaintance of Landis, between whom there had been previous dealings. His evidence does not indicate a clear recollection as to what was said at the interview with Meir when Landis introduced them, but while it tends to support Landis' contention that a loan and the refunding of the Graham mortgage were spoken of, yet as Brewer then disclosed unwillingness to consider the stock deal it may be probable that the matter of a loan instead of a sale of the stock was then suggested by Landis, as he claimed, and tentatively discussed. But it is hardly probable that merely at such suggestion and without consulting his fellow directors, Meir all at once changed their plans and authorized Landis to negotiate for a specific loan of three and one-half millions and the refunding of the Graham bonds, which so far as the record shows had not been contemplated or discussed up to that time either by defendant's directors or the holders of said bonds.

Belger, whose interview was subsequent to that between Brewer and Moir, stated that his interview was with reference to taking the stock and not to a bond issue, and that no suggestion of the latter was made until he informed Moir that he was not interested in negotiating for the stock. His testimony is to the effect that after submitting the matter to his firm as a stock and not a bond transaction he informed Landis that the firm was not interested in the stock proposition, and that Landis then suggested that Moir might be interested in a bond issue but that he never saw Landis or had any communication with him from that time on, that Landis did nothing to bring about the deal, but that it was taken up as a new proposition independently of him more than two months afterwards. Landis does not claim to have performed any special services after introducing Belger to Moir except to take Belger copies of leases and some papers about the time he first presented the matter. Belger says that such papers were sent from the hotel after his firm took up the matter in September.

To fortify his account of these matters Landis stated that at the original interview Moir said he wanted an additional loan to take care of a mortgage on the hotel property to the Edison Electric Company, whereas the mortgage was not then in existence, and that he had a conversation about the loan with Moir in the presence of one of his witnesses in a portion of the hotel, which, as shown in rebuttal, had at that time been torn down. The few corroborative circumstances relied on, thus refuted, were only indirectly so and depended for their verity upon the testimony of persons who admitted that they expected some sort of a division of plaintiff's commission in case of his success, although there was nothing in the record to indicate that they had rendered any services to earn it.

The hearing was not as full as it should have been owing to erroneous rulings upon the admissibility of evidence. Defendant offered to show what took place at the interview between Holger and Moir in September when negotiations between them were renewed or actually begun. Their conversation was ruled out on the theory that Landis was not present. The main question at issue was, whether plaintiff was the procuring cause of the loan. And the way the negotiations came to be renewed was pertinent to the question. It was the claim of defendant that Holger was induced to renew the negotiations by Lewis, whose bank held an undisposed of portion of the Graham bond issue. If the holders of these unsold bonds were interested in a refunding scheme and through them Holger was induced to take up the matter that resulted in the loan, that fact had a direct bearing on the question of procuring cause. Lewis was not called as a witness, nor Holger interrogated as to what Lewis had said to him, nevertheless what was said in the negotiations between Moir and Holger was not incompetent because Landis was not present. On the other hand, their full conversation on thus coming together for the first time to consider the proposition of a loan on the terms consummated may have thrown much light on the issue as to how it came to be negotiated.

Landis denied that he had been a broker for any one than himself for fifteen years. Defendant offered in evidence his answer to a bill filed February 6, 1915, in which he stated that he was in 1912 and for a long time prior thereto and since said date a regular licensed broker conducting business in the City of Chicago. This was competent impeaching evidence and improperly rejected. He was not a licensed broker, but claimed that this was a single transaction for which no license was needed, and that he was not engaging in any other transactions

The hearing was not as full as it should have been
with a strenuous judge upon the unpleasantness of witnesses.
Substantial effects is done when such place at the instance
between Taylor and Daly is impossible when circumstances between
them were present as actually begun. Daly's representation and
relied not on the theory that Smith was not present. The main
question at issue was, whether plaintiff was the proximate cause
of the loss. And the only the negotiations came to be received
was pertinent to the question. It was the claim of defendant
that Taylor was intent to cause the negotiations by Smith, cause
that Smith is ignorance of persons of the Grahm Steel Lines. If
the policies of these would have very interested in a situation
without and through them Taylor was induced to take up the matter
that resulted in the loss, this fact but a direct bearing as the
question of proximate cause. Irwin was not called as a witness,
nor Taylor questioned as to what Irwin had said to him, nor
whether that was said in the negotiations between Daly and Taylor
was not inconsistent whether Smith was not present. In the action
court, that full conversation on this meeting together for the
first time be material the proximities of a loss on the other
circumstances may have thrown much light on the issue or in
it come to be important.

Lewis Evans Cole at has been a broker for any one
from January for fifteen years. Continuous activity in writing
his labor to a full "line Policy", 1911, in which he stated
that he was in 1910 and for a long time prior thereto and when
small had a regular financial broker conducting business in the
city of Chicago. This was commonly understood witness was
generally related. He was not a insurance broker, but claimed
that this was a single transaction for which he thought was

for others at that time. However, his own witness, Brewer, testified on cross-examination that plaintiff had submitted to him at different times in the years from 1914 to 1919, inclusive, propositions to secure money for other parties. While there was no evidence of any other deals consummated by Landis in 1916, that would make him amenable to the ordinance requiring him to procure a license yet the evidence was about equally balanced on the point of his being subject to its provisions.

The court also rejected defendant's offer of a bill in chancery filed by Landis January 24, 1917, against defendant and the firm of Belger, Mosser & Willaman, in which he gave a version of the transaction not altogether consistent with his sworn testimony at the trial. We think it was relevant so far as it disclosed any such variances.

We think the court also erred both in excluding a letter from said firm addressed to defendant September 21, 1916, in which they presented the details of their offer, and defendant's answer thereto. As confirmation of the first actual steps taken by Belger's firm to consider the loan that was consummated, they were relevant to the issues.

The court also erred in not receiving in evidence defendant's corporate minute book showing when it first took corporate action with reference to the loan.

In our opinion everything said and done in the procuration of the loan was competent for the purpose of showing who and what were the instrumental factors in consummating the deal, and in the absence of any affirmative proof of what were the operating influences, and in view of the exclusion of evidence that might throw direct light on the subject, we are not disposed to let a judgment of such magnitude rest upon no more substantial proof than that the negotiators were originally brought together through an introduction by plaintiff. Accordingly the judgment

the edges of their films. However, this was extreme, however, considering the circumstances that plaintiff had encountered in the form of difficult times in the years from 1951 to 1972, however, difficulties he might easily not expect perhaps. While there was no evidence of any other drive encouraged by Jamila in 1972, that would make his memories to the extraordinary circumstances in regards a listener gave the opinions and always equally believes on the point of his being unfairly in the prevailing.

The novel also explicitly differentiated's after of a 1972 film discovery filed by Jamila Pandey in, 1972, regardless difficulties and the film of Malgar, Nirmal. A difference, in which he gave a description of the transaction not independent circumstances after his known existence of the trial. He stated it was believed as the one is statement not made evidence.

In claim the novel also stated that in production a limited from such film administrative in distributed independently in, 1984, from which they presented the difficulties of shortly after, and independently character therein. In specifications of the first circumstances where by Malgarita film in regardless was issue that are consequences, that means pertinent to the listener.

The jury also stated is not difficulties in criticism independently, novelists claim that showing that in 1984 the misunderstanding critics made criticisms in the issue.

In our opinion everything said can come to the provisions of the laws was considered for the purpose of showing the and that were the independent listeners in considering the trial, and in the charges of any differentiation proof of which were the expressing information, but in view of the evidence of criticism that which these clearly light on the initiative, we can not disagree in fact a judgments of such misunderstanding that even we more independent listener than the questionable case relationship through considered

will be reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

Gridley, P. J., and Morrill, J., concur.

41 - 26658

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

WILBERT R. ROBINSON,
Plaintiff in Error.

ERROR TO THE CRIMINAL COURT OF COOK COUNTY.

224 I.A. 653

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiff in error was a defendant to several indictments that were set for trial, and made application for a change of venue. In ruling thereon the court announced he would grant it, and said he was satisfied that the application was being used as a subterfuge. His attorney thereupon attempted to address the court, when plaintiff in error (as shown by the record) "loudly, vociferously and boisterously, and without being addressed or questioned by either the court or by counsel on either side, said, 'Now you shut up.'" The court then admonished plaintiff in error to be quiet and orderly but he continued to speak, as the record says, in a loud voice and exclaimed in open court, "I have a right to protect my character. The judge has no right to assail my character until he finds me guilty." Whereupon the court ordered and adjudged him in contempt and that he be forthwith committed to the county jail for fifteen days and to pay a fine of $500 and costs.

Before the entry of the order plaintiff in error apologized to the court and disclaimed any intentional disrespect, and it is claimed that fact should have been taken in consideration in extenuation if not in purging the contempt, and that the punishment is excessive.

The order sufficiently recites what took place and shows, in our opinion, a manifest disrespect for the authority and dignity of the court, if not an attitude of defiance.

Rights of the owner of insurance.
Including in insure.

Ex.

Liability of, mentioned.

Liability in insure.

Exists in the existing owner
of that district.

ex. Section insure insurance and action by the owner.

PLAINTIFF in error was a defendant in several initiative petitions that were not for title, and made application for a change of venue. In writing therein the words attributed to which error is, and said he was entitled from the application was being used as a subterfuge. His attorney therefore attempted to secure the court, under PLAINTIFF in error (as stated by the court) "fairly, reasonably and judiciously, and without being influenced or controlled by either the court or by himself or other side, said, 'Use you what you.'" The court then determined plaintiff is going to be judge and actually had be appointed is court, in the "court" court, in a land value and contained in such court. If have a right to protest by demurrer. The judge has no right to decide in court by demurrer but will be View as judge." Therefore the court ordered the adjudged fair in contempt and that is be furnished committed to the county jail. The filings days and to pay a fine of $100 and costs.

Before the entry of the judge plaintiff in error complained to the court and introduced one instrument in evidence, and it is stated that should have been given to constitution in returning if not in proving the contents, and that the judgment is erroneous.

The order multiplied twelve jail two times and fines, in my opinion, a modified disposition for the activity and

But we are of the opinion that the punishment imposed is somewhat disproportionate to the offense, especially in view of the apology and attempt to make amends for remarks evidently made in the heat of anger. For that reason and that alone the order will be reversed and the cause remanded with directions to impose a somewhat lesser punishment more fitting to the offense committed. Seemingly a small fine or brief imprisonment should in this case suffice to sustain the dignity of the court and enforce respect for its authority. Accordingly the order will be reversed and the cause remanded for proceedings in conformity with this opinion.

REVERSED AND REMANDED
WITH DIRECTIONS.

Gridley, P. J., and Morrill, J., concur.

103 - 26759

JOHN M. GRIFFIN,
Defendant in Error,

vs.

JOHN C. WHITING, doing business as
SOCIAL SERVICE STAFF,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

224 I.A. 654

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Defendant in error, John M. Griffin, brought this suit against John C. Whiting, plaintiff in error, upon an alleged oral agreement whereby the former was to work for the latter as general manager at a salary of $75 per week and was to receive a bonus of ten per cent of the profits made by Whiting during the time Griffin was so employed by him, provided he remained in his employment for one year. Whiting denied employing Griffin in such capacity and that there was any such agreement as alleged, and that he made any profits. This appeal is from a judgment entered upon a verdict in plaintiff's favor, assessing damages at $2,000.

No claim is made for salary under the alleged contract but only for an unpaid bonus. The main and controlling question presented is, was there a contract for a bonus, and if so, what were the profits.

In 1916, defendant Whiting was engaged in conducting campaigns for raising money to aid various institutions, and during one of said campaigns met plaintiff Griffin, a physician employed in a hospital in Iowa. Letters and telegrams subsequently passed between them relative to Whiting's employing Griffin in such work. This correspondence held out to Griffin as an inducement "a salary and a share in the profits." Pursuant to arrangement Griffin joined Whiting on a train leaving Chicago

for the east where Whiting was to open a campaign for raising funds for Hampton Institute. Under an oral arrangement made on that trip Griffin started work January 28, 1917, at a salary of $75 per week, and, as he contends, upon a definite, accepted offer from Whiting, to give him such salary and traveling expenses, and if he should stay with him for a year or more, a bonus of ten per cent of the profits in the interim, and more if the business justified it. Griffin testified that he asked what he meant by the word "profits," and Whiting answered: "As I will draw no salary what I get out of the business will be considered profits."

Griffin continued in Whiting's employ until June 14, 1918, with the exception of a vacation of two weeks, and received a salary for every week, which varied, however, from time to time, according to the campaigns they were engaged in. Griffin says he consented to a reduction of salary in certain campaigns on Whiting's saying to him, "In reducing your salary for a patriotic cause you will be reimbursed in your bonus. That will make up for any reduction in your weekly salary." No claim for salary, however, is made.

In the latter part of 1917 they were engaged in what was called a "drive" for the Y. M. C. A. in this State, and later Griffin was given supervision over a western part of the country for a drive for the Salvation Army. A letter from Whiting to Griffin January 30, 1918, says he was to receive a salary of $60 a week and expenses while engaged in the work of that campaign. This is the only written agreement between them disclosed by the record. We think it is a clear inference from the evidence that Griffin started with an agreement for a salary of $75 per week, but was induced, either from the character of the campaigns or the promise made of a bonus, or both, to accept a lesser salary in certain campaigns. Plaintiff's claim, therefore, was based wholly

on the failure to pay a bonus.

Whether there was an agreement for a bonus rests wholly upon the testimony of the parties themselves and letters and telegrams that passed between them. While defendant denies that there was any definite agreement as to a bonus he admitted that one was talked about, and his correspondence indicates that there was an understanding that he would pay one. When after Griffin had been employed for a year or more he inquired with regard to the bonus, he seems to have been put off by Whiting on the pretext that he hadn't "figured it out" and had not had time "to look over his books." While they disagree as to conversations with respect to the matter, correspondence between them in the last month of Griffin's service tends to support Griffin's contention that there was an agreement for a bonus. He became insistent upon an understanding at that time, having been put off from time to time with regard thereto. June 19th he wired Whiting at New York, saying: "Send last week's check, wire definitely basis bonus due that I may know what to depend on." He explained the word "basis" by saying that at different times Whiting had indicated that he might give him more than ten per cent, according to the growth of the business and what it would justify, but never less. Whiting replied: "As soon as I can give some uninterrupted time to the books I will figure it out and write you." This was a clear admission that Griffin was entitled to a bonus if there were any profits. On June 24th Griffin again wrote: "It was not my idea that you tell me the amount until you have figured up the profits on the campaign. My telegram read: 'Basis of bonus.' You have indicated different percentages and I would like to know what I can depend on." In another letter, July 4th, Griffin said that defendant's indifference to his claim for the bonus due him had made it impossible for him to continue his confidence or his services, and demanded immediate satisfaction. To the last two letters Whiting replied:

on the failure to pay a bonus.

Neither there was no agreement for a bonus, only doubts upon the benevolency of the practice discussion and history and colleagues had passed between them. While defendant denies that there was any definite agreement as to a bonus he admitted that one was talked about, and his correspondence indicates that there was an understanding that he would pay one. Then after Christmas had been employed for a year or more he inquired with regard to the bonus, he seems to have been put off by Mellen on the grounds that Mr Bush's "figures is out" and had not had time "to look over his books." While they discussed as to commissions with respect to the matter, correspondence between them in the last month of Mellen's service tends to support Mellen's insistence that there was no agreement for a bonus. On behalf independent upon or relative to the finding of this fact, having been put off from time to time with regard thereto. Then 1918 he asked Mellen at New York, saying: "Come just with's check, who's definitely whether there was this I and have this to be signed up." He explained the case "Mellen" to Mellen that it different times Mellen had mentioned this to him right his more than his own work, according to the growth of the business and what it would justify, but never been. Mellen replied: "As soon as I can give some indication that by the bank, I will figure it out and write you." This was a clear indication that Mellen was willing to a bonus if there were any profits. In this this Mellen again said: "It was always in my mind that you would the second month you have figured up the profits on the business, by February year: 'Quite of bonus.' You have indicated difficulty investigation and I would like to know what I can expect on." In February 1918, July 4th, Mellen said that Christmas's business difficulties be the claim for the bonus for the but said it impossible for him to continue this conditions in his services, and therefore

"Our understanding of the bonus makes it dependent upon mutual good will. No figures have ever been mentioned."

When Whiting, on cross-examination, was asked to explain the telegram sent to Griffin in which he said: "Salary free and share of profits without investment," he answered that he did not consider it a promise inasmuch as it was not accepted. But it was this telegram, among other things, which led Griffin to come to Chicago to make arrangements which, according to his testimony, conform to the inducement thus held out. We can reach no other conclusion from the evidence, when read in the light of Whiting's own letters, that there was an express agreement for a bonus. And inasmuch as he flatly denied that there was such an agreement we think, in view of the inconsistency and evasiveness of his testimony on this subject, the jury were justified in accepting Griffin's version of the contract that there was an express agreement for ten per cent of the profits.

But we find no basis in the evidence for a verdict of $2,000. The evidence showed receipts of $51,655.30 during the period of Griffin's service, and expenses of about $100 more than the receipts. Of the expenses $37,062.95 were paid out in salaries, including $10,500 to Whiting himself. Plaintiff was obliged to rely upon such evidence with regard to profits as he obtained through defendant's testimony. There was no other evidence upon which his percentages could be based, and no direct refutation of the correctness of defendant's figures. According to Griffin's testimony, in estimating profits defendant was to receive no salary. If that is true, as evidently believed by the jury, we find no other item in the account upon which plaintiff can base his claim to a percentage. The verdict therefore should have been for $1,000. If defendant in error will within ten days herefrom remit the judgment to that amount it will be affirmed. Otherwise it must be reversed and the cause remanded for a new trial.

-6-

JUDGMENT OF REMITTITUR.

Gridley, P. J., and Merrill, J., concur.

124 - 26781

WILHELM KRUPKA,
Appellant,

vs.

JOHN PALUCH,
Appellee.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

224 I.A. 654

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is a suit upon a judgment note for $500 signed by appellee, Paluch, payable thirty days after July 16, 1918, to the order of Bruno Boguszewicz, between whom a written contract was entered into on that date for an exchange of real estate, which defendant refused to perform, claiming it was procured by misrepresentation. A previous judgment by confession was opened up for a defense, and on the hearing a verdict was rendered for defendant. The appeal is from the judgment entered thereon.

Reaching the conclusion we do it would subserve no beneficial purpose to review the conflicting evidence, for we can not concur in any of appellant's contentions. We do not think the verdict was against the weight of the evidence or that the evidence did not show that the note was transferred after maturity to the plaintiff; nor do we think there is any foundation for the contention that testimony was received for defendant either to impeach one of his own witnesses or to vary the terms of the written contract; nor do we find error in allowing the judgment by confession to be opened up for defense.

But it is clear from the record that there was no cause of action. The contract contains this ambiguous clause:

> "The party of the part further agrees to pay to the party of the part, at the date of the delivery of the deeds hereunder, the sum of Dollars ($) cash, and should be confessed against either of them for $500.00 which note each signed in case of them fail to carry their part of this contract to cover all damages, Broker's fees and liquidated damages."

It was under this clause that the note in question was delivered over by the escrowee to Boguszewicz, who later transferred the note to plaintiff.

But we do not think the clause referred to can be interpreted as an agreement to fix $500 as liquidated damages. The note was evidently intended as security for whatever damages might be sustained not in excess of $500. This, we think, is a reasonable interpretation of the contract, and, therefore, regardless of the fact whether the note was transferred before or after maturity, in order to recover thereon it became necessary to present proof of the damages sustained by reason of defendant's refusal to carry out the contract, and also proof of a tender on the part of Boguszewicz to perform. No proof of that character was introduced, and hence the proof was inadequate to support the action. Accordingly the judgment will be affirmed.

AFFIRMED.

Gridley, P. J., and Merrill, J., concur.

144 - 26802

ENGELBERT BLUM,
Appellant,

vs.

CLAUDE D. HENDERSON,
Appellee.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

224 I.A. 654

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Appellant brought this suit to recover damages for personal injuries resulting from appellee's automobile running into a wagon drawn by two horses, which plaintiff was driving, whereby he was thrown and suffered various injuries. The jury rendered a verdict for $1,000 in his favor, and he appeals from the judgment entered thereon on the ground that the proof clearly established that the damages he suffered were much in excess of the amount of the verdict. Appellee assigned cross errors to the effect that the trial court erred in denying his motion at the close of the evidence to find him not guilty, and refusing instructions to that effect, and also that the verdict and judgment are contrary to the weight of the evidence.

About an hour after sunset, November 30, 1918, plaintiff was driving his employer's team west on the north side of Jackson boulevard, Chicago, and turned and crossed the street to enter an alley leading south from said boulevard. When about at the entrance of the alley his wagon was struck by appellee's automobile, also going west.

That appellee was driving at the time of the collision on the south side of the street he explained by saying that appellant's team suddenly appeared before him when he was about 25 feet away, and that he swerved his car to the left and put on his emergency brake to avoid a collision. Those in an automobile, or some of them, following appellee testified that he passed their

car, driving at a rate of about 25 to 30 miles an hour; that he had plenty of room to pass on the north side of appellee's team; that their automobile was about 100 feet behind appellee's at the time of the collision, and that the boulevard lamps were lit. The evidence indicates that there should have been no difficulty on appellee's part, in the exercise of ordinary care, in seeing appellant in sufficient time to have avoided a collision. His excuse for not seeing the team was he saw no light on the wagon. There was evidence tending to show that a red light was suspended beneath it, and that it was seen by one of the occupants of the automobile following appellee's. An ordinance was introduced which requires a red light to be attached near the rear of the wagon where it will be visible to approaching cars. While the lamp does not appear to have been placed where required by such ordinance the evidence does not disclose that the failure to have it there was the proximate cause of the collision. Hence we think appellee's assignments of cross error were not well taken, and that the evidence was sufficient to establish his liability.

Nor can we concur with appellant's contention that the evidence shows that the amount of damages awarded was manifestly insufficient. Plaintiff suffered a broken leg and a broken arm. The evidence discloses that as a result of the accident there is some limitation to their use and that of the arm may be permanent. Plaintiff also claims damages for hospital expenses of $231.00, of which $200 was paid by his employer to meet his liability therefor under the Workman's Compensation Act, and also a cash loss of $1,074 in wages.

As to the hospital bill. It is contended by appellee that as $200 of the expense were paid by appellant's employer it could not properly be included in the verdict. On the other hand, appellant suggests that plaintiff might be liable therefor to his employer under section 29 of the Workman's Compensation

Act. We think it is sufficient to say with respect to this item that the record does not contain facts sufficient to enable us to say that plaintiff would ever be required to refund such amount to his employer. It devolved upon him to shew his damages, and it not appearing that the $200 was paid by plaintiff or a liability of his, the jury may properly not have included that item in their verdict.

As to the claim for loss of wages. We are not impressed with appellant's contention as to the conclusiveness of plaintiff's evidence bearing thereon. The period of his disability was 32 weeks. His regular wage was $23 per week, and would have amounted to $736. He claimed that usually in that period of the year he would be required to work overtime and would receive increased wages of from $32 to $45 per week, and estimated that there would be about 13 weeks of overtime. He also claimed that after he returned to work he received $21 per week at other employment for 42 weeks, suffering a loss of something like $10 a week for that period.

But in computing the damages the jury may have taken into consideration evidence tending to shew that the impairments of the use of his arm and leg were not as great as claimed, that he might on resuming work have continued his work as teamster at the same wages as previously, and that his estimate as to overtime was more or less speculative, in the absence of producing any record thereof that seemed to be available. While the jury might have given a larger verdict by computing the loss of wages on plaintiff's basis and including a greater sum for suffering and disability, yet the character of the evidence was not such, in our opinion, as presented a basis for mathematical accuracy in computing the damages or as required the jury to accept plaintiff's theory of damages without qualifications.

We think, therefore, that the proof of damages was not such as required the jury to compute them at a greater sum than that assessed, or that the amount assessed was so inadequate as to call for a reversal of the judgment. Accordingly it will be affirmed.

AFFIRMED.

Gridley, P. J., and Morrill, J., concur.

187 - 26847

IMEX CORPORATION,
Appellee,

vs.

A. DAIGGER & COMPANY,
a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

224 I.A. 654

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment for $1,498.97 entered against the defendant as of default. After striking from the files three successive affidavits of merits filed by defendant, the court, over defendant's objection, entered said judgment as of default, denying defendant leave to file any further affidavit.

The statement of claim was for $2,000 and is divided into numbered paragraphs which correspond to counts in a declaration. The cause of action in the first is based upon the sale and delivery of material, April 5, 1920, under an attached memorandum of contract, calling for the delivery of ten barrels of approximately 500 gallons each, of vegetable orange liquid color, at $3 per gallon, in five barrel lots within approximately thirty and sixty days.

The second paragraph or count states as a cause of action the receipt from defendant of a check for $1,473.12, May 25, 1920, payment upon which was stopped, and the third paragraph is based upon the theory that the sending of such check constituted an account stated.

Defendant's third and last affidavit of merits denied that plaintiff shipped the goods in accordance with the contract in five barrels lots within the period provided therefor, or the kind or character of goods required, and alleged that the

material was defective in color, material and character; that the contract sued on was subsequently modified and changed; that the shipments and deliveries were not in five barrel lots but in seven and three barrel lots, entailing a loss upon defendant who, as known by plaintiff, had contracted to make deliveries to its customers under the particular stipulations and terms of plaintiff's contract as to quantities; that accordingly defendant complained and refused to accept the material within fifteen days after its receipt, in accordance with a provision of the contract that "Claim for defective material, short weight, or other causes, be made within fifteen days after receipt of any material;" that plaintiff also failed to comply with the contract as to the terms of payment, specifying in what respect, and denying that the contract as sued upon embodied the agreement and terms upon which the goods and material were purchased by defendant, and alleging that its losses by reason of plaintiff's non-compliance with the terms of the contract were greater than the amount sued for.

We fail to see why this affidavit of merits did not put at issue the material facts on which plaintiff claimed the right to recover upon an express contract. It put directly in issue what was the contract, and whether performed on plaintiff's part, and also whether defendant was not entitled to recoupment. Defendant was not required under any rule to plead his evidence, and it is not pointed out, and we fail to see, in what respect the final affidavit of merits, or, in fact, some of those preceding it, did not state a legal defense and entitle defendant to a hearing on the merits.

But appellee claims the right to recover on the second paragraph from the fact that defendant sent him a check, payment of which was stopped. In a preceding affidavit that was stricken defendant stated that such check was sent through a

misapprehension of the facts and that it did not constitute a stated account. While this was not specifically set forth in the final affidavit of merits, perhaps because it was held to be bad pleading, yet the final affidavit of merits denied each and every allegation of the statement of claim not specifically denied in said affidavit, thus putting at issue both allegations as to whether the check was sent and whether, if so, it constituted a stated account.

Appellee contends that there was no abuse of discretion on the part of the court in entering a default without permitting defendant to file another affidavit of merits. Whether there was an abuse of discretion can be determined only by considering the sufficiency of the affidavits previously stricken. If they did not undertake to state a legal defense the contention might be upheld. But we think they did, and, furthermore, that some of them should not have been stricken.

While it is the rule that a defendant must stand by his pleading to avail himself of error in the ruling of the court thereon we cannot but be impressed from reading the several stricken pleadings that the ruling of the court thereon justifies a complaint frequently made in this court that the strictness of rulings on pleadings in the Municipal Court renders it far more difficult to present a legal defense in that court than contemplated by the simplicity of pleadings and practice provided for by the Municipal Court Act.

The motions to strike appear to have been general, thus performing, as held by the Supreme Court, the function of a general demurrer. Had specific grounds for striking the pleadings been stated in the motions they would have enlightened defendant in preparing an amended affidavit, and this court in determining the grounds of the court's action in striking them. While the record does not disclose such grounds we fail to see any justification

for the court's action. Accordingly the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Morrill, J., concur.

206 - 26866

G. M. MASON,
Appellee,

vs.

CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

224 I.A. 654

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This action was to recover damages from delay of transportation of stock shipped for appellee over appellant's railroad from Lakenan, Mo., to Union Stock Yards, Chicago. Plaintiff claimed the delay was unreasonable and that he sustained damages from decline in market prices, extra shrinkage and extra feed. The appeal is from a judgment for $145.60 entered on the court's finding for plaintiff upon the basis, as disclosed by the record, of a decline in the market of 25 cents per cwt., computed upon 58,240 pounds. The record contains no evidence of either such number of pounds or of a decline in the market price. The court appears to have estimated a decline of such price by consulting a stock journal, not introduced in evidence.

But the gist of the action was unreasonable delay, the burden of establishing which rested on plaintiff, (10 Corpus Juris, sec. 429, Johnson v. C. B. & Q. Ry. Co., S. W. 470) and was not shown by adequate proof.

Plaintiff was the only witness. At the close of the case defendant's motion for a finding in its behalf was denied.

The only basis in the evidence for the implied finding that there was unreasonable delay was that the train did not make as good time as was made in a previous shipment made by plaintiff nearly nine months before between the same points. But there was no proof whatever of the schedule time, or the usual time taken

in transportation between such points, or to show that the stops made at two or three different points *en route*, testified to by plaintiff, were unusual or unreasonable. In fact, there was an entire absence of competent proof to show unreasonable delay, which was essential to the right of recovery. Accordingly the judgment will be reversed with a finding of fact.

REVERSED WITH FINDING OF FACT.

Gridley, P. J., and Merrill, J., concur.

206 - 26866 FINDING OF FACT.

We find that there was no unreasonable delay in the transportation by defendant of the stock of plaintiff as alleged in the statement of claim, and that whatever loss he suffered was not occasioned through negligent transportation or unreasonable delay of the shipment by defendant.

224 - 26884

JOHN H. CLAUS,
Appellant,

vs.

L. C. CONLEY,
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

224 I.A. 655

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This cause of action is predicated upon the following writing set forth in haec verba in plaintiff's statement of claim;

"10/25/19

Mr. John H. Claus,
Peoria, Ill.

Dear Sir:

As requested by you, in consideration of one dollar, I hereby give you my assurance and guaranty that your note due from Herman Claus for One Thousand Dollars will be paid on or before May 1-1920.

This letter is given upon your assurance you will take no steps legal or otherwise to enforce payment upon said note prior to May-1920 otherwise this letter and guaranty to be of no force or effect and absolutely void.

Yours truly,

(Signed) L. C. Conley

Witness
O. J. Chambers (Signed)
Fred Hussey (Signed)"

The statement of claim alleged that the word "note" used in said agreement refers to two notes, (set forth in haec verba) for $500 each, one payable to plaintiff's order, and the other to the order of Henry W. Claus, and endorsed by him to plaintiff.

Defendant denied any indebtedness, that there was a consideration for the guaranty, and that said notes were covered by it.

At the close of plaintiff's case defendant also rested, and the court made a finding of the issues in defendant's favor.

Plaintiff was the only witness called. He made proof of said guaranty, introduced as his Exhibit 1. He testified that he had always been the owner and holder of the notes in question since the date of their execution. Both were judgment notes dated October 20, 1919, payable in monthly installments of $20.84 until paid, and executed by Peoria Tire Service, per H. H. Claus and by Herman H. Claus, who signed one in his full name and the other as H. H. Claus. Plaintiff testified that Herman Claus had not paid any sum upon them, and that he had taken no steps to enforce their payment.

After such preliminary evidence he was asked by plaintiff's counsel: "Are those two instruments" (referring to said two notes) "the aggregate sum of $1,000, the note referred to in plaintiff's Exhibit 1?" Defendant's objection thereto was properly sustained as the question called for a conclusion instead of specific facts. Thereupon plaintiff testified that said notes were the only instruments held by him on the date of the guaranty evidencing any indebtedness to him from Herman Claus for $1,000; that on that date Herman owed him $1,000 for money which he loaned to him and which was used to buy out his partner's interest in the "Peoria Tire Service," leaving Herman Claus the sole owner of the business carried on in that name at the time both of the execution and delivery of the notes and of the guaranty. The notes were reoffered in evidence and rejected on the principle that parol evidence was inadmissible to contradict or vary the terms of the written guaranty.

It also appeared from the evidence that the one dollar referred to in the guaranty contract was never paid, and that before May, 1920, plaintiff had on one occasion asked Herman to pay part of what he owed him. It is contended by appellee that these two facts sustain his plea of no consideration for the guaranty. Inasmuch as by the terms of the notes judgment might have been taken

at any time for such sum as might be unpaid, including attorneys' fees, and as no installment was ever paid and plaintiff did not attempt to enforce payment under such clause authorizing a judgment by confession or otherwise we think the fulfillment of his agreement in this respect was sufficient consideration to support the guaranty, and that the mere request for the payment of what was due was not a breach of the promise to forbear, which was a sufficient consideration to support the guaranty. (McMicker v. Safford, 197 Ill. 540.)

The main question is whether the court erred in receiving the two notes in evidence on the ground that they varied and contradicted the terms of the written guaranty.

There was no proof of a note due plaintiff from Herman Claus for $1,000, as described in the guaranty contract in language which of itself is capable of but one construction, namely, a specific note for that amount due to the former from the latter; and the evidence discloses that there was no such note. The language is unambiguous and is in nowise modified by any other language in the instrument. It is apparent therefrom that the intent of the parties had reference to a specific note for $1,000. If such language did not express the real intent of the parties, a court of chancery was the proper forum in which to have it corrected. It could not be done by parol evidence in a court of law. This doctrine is so fundamental as not to require citation of authorities.

It is declared to be a settled rule of law in this State "that the undertaking of a surety is to be construed strictly, and that he is bound to the extent and in the manner and under the circumstances pointed out in his obligation, and no further;" (Tolman v. Rice, 164 Ill. 255; Schreffler v. Nadelhoffer, 133 id. 536. In the former case the court said his liability is not to be extended by implication, that the liability of guarantors is governed by this principle, and that the law requires a

strict construction in favor of the guarantor. The terms of the contract itself are not ambiguous. Hence resort to extrinsic evidence to ascertain its meaning and intent is not admissible. It is only by resort to such evidence that liability under the guaranty for the non-payment of the two notes in question can be implied. According to the decisions referred to liability cannot be extended by implication, and on well known principles resort cannot be had to extrinsic evidence for the purpose of furnishing ground for such implication, where the instrument itself is unambiguous.

Accordingly we think the judgment should be affirmed.

AFFIRMED.

Gridley, P. J., and Morrill, J., concur.

2-934

263 - 26924

WILLIAM E. BURGESS,
Appellee,

vs.

A. B. FIRCLA,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

224 I.A. 655

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiff claimed that defendant was indebted to him for work and labor in unloading plastering and hauling rubbish upon certain dates between October 12, 1919, and March 3, 1920. He testified that defendant agreed to pay 85 cents a ton for unloading plastering, and $3.00 a load for hauling the rubbish. The account appended to his statement of claim gives dates, quantities, prices and credits, showing a balance due him of $134.85. We find by referring to the record that his testimony corresponded to such statement of account, but appellant has not abstracted such parts of the testimony as would enable us to determine therefrom the precise amount due, which was the matter in dispute. He not having done so, we are not obliged to go to the record in order to reverse the judgment. This is a familiar rule observed in this court. As appellant has abstracted only such parts of the evidence as bring before us certain rulings of the court we shall confine our opinion to the points made with regard thereto.

Appellant urges that it was error for the court to permit plaintiff to refer to his book of account kept by him showing the dates and quantities of deliveries. He testified that the book was made and kept by him in the regular course of business, that he could not recall such items without reference to the book and knew they were correct when entered, and could testify to the

recollection of such items if permitted to refresh his recollections by reference to the book.

There was no error under such circumstances in permitting him to do so. As a general rule a writing or memorandum can properly be used to refresh the recollection of a witness if he is able, after inspecting the writing, to testify to the facts from present recollection. (Diamond Glue Co. v. Kistrychowski, 227 Ill., 338, 346.)

Appellant urges that it was error for the court to permit a witness for plaintiff to testify to the usual ordinary and customary charge for unloading and hauling materials of such character. Inasmuch as there was a dispute as to whether the parties' minds met in an agreement as to prices, and as the statement of claim was not confined to an action upon an express contract, it was proper, in case the jury found there was no express contract, to permit recovery on the basis of quantum meruit. Hence such evidence was admissible.

It is also urged that the court erred in giving an instruction which told the jury that they might consider as due what defendant admitted to be due, and that it was their province to decide from all the evidence what the contract really was. There was no error in giving such instruction. Accordingly the judgment will be affirmed.

AFFIRMED.

Gridley, P. J., and Merrill, J., concur.

33 - 26972

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

ALEC ARMOUR,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

224 I.A. 655

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiff in error was convicted on an information sworn to January 18, 1921, charging that he did knowingly, unlawfully and without consideration, take, accept and receive money from a certain female that was a part of her earnings from the practice of prostitution. He pleaded not guilty, waived in writing a trial by a jury, and was tried by the court and found guilty. Errors are assigned upon the denial of a motion in arrest of judgment and a motion for a new trial. The latter, of course, is unnecessary and improper, the trial being had without a jury. But neither motion is preserved in the bill of exceptions and, therefore, assignments of error thereon are not well taken.

Nor can this court pass on the question of the constitutionality of the law of 1917, relating to pandering, under which plaintiff in error was prosecuted. (Village of Morgan Park v. Knopf, 199 Ill. 444.) However, it may be said that the points raised with respect to its validity and the jurisdiction of the Municipal Court to try a case thereunder where it is not charged to be a second offence have already been adversely decided to plaintiff in error's contentions in People v. Boykin, 289 Ill. 11.

We also think the evidence was sufficient to sustain the court's finding and judgment, which will be affirmed.

AFFIRMED.

Gridley, P. J., and Morrill, J., concur.

489 - 27478

R. C. DARLEY,
Appellant,

vs.

WILLIAM HALE THOMPSON, Mayor of the City of Chicago, CHARLES FITZMORRIS, Chief of Police of the City of Chicago, and CHARLES BOSTROM, Building Commissioner of the City of Chicago,
Appellees.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

224 I.A. 655

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Appellant filed his bill against the mayor, chief of police and building commissioner of the City of Chicago to restrain them as such officers from revoking a building permit theretofore issued to him, and from interfering with his erection of a building in accordance with plans that had been duly approved by such building commissioner.

The bill charged that said permit was issued to him February 14, 1921; that he employed a contractor and purchased all the materials necessary to construct the building at an expense of $15,000; that he began work and nearly completed the foundation on February 15, 1921, when appellees ordered the building stopped without good or valid reason therefor, and in consequence he has been unable to do anything since; that he complied with all the laws, ordinances and requirements of the building department pertaining to the erection of the building; that appellees have threatened to revoke said permit, and states certain facts tending to show that he will suffer irreparable injury if not permitted to proceed with the erection of the building.

Appellees answered that appellant had not complied

with all the laws and ordinances pertaining to a building to be used for the purposes appellant intends, in that the location of the proposed building being in a residential neighborhood, complainant was required under a certain ordinance in order to obtain a permit to erect a building for such purposes to procure the written consent of a certain number of property owners in the block, which he did not do.

The master to whom the matter was referred to report his conclusions heard evidence and reported conclusions which conform to the allegations of the bill. Appellees' objections to the report were overruled and the matter coming on to be heard upon said report, the exceptions thereto, the pleadings and the evidence, the court ordered the bill dismissed for want of equity at complainant's costs.

The appeal was taken to the Supreme Court on the theory that the ordinance in question was unconstitutional. That court holding that the question of its unconstitutionality was not raised in the trial court, and the record not containing a certificate of the trial judge to entitle appellant to raise the question of the validity of the ordinance in said court, the appeal has been transferred to this court. (229 Ill. 122.)

The briefs filed in that court have been refiled here. Aside from the alleged unconstitutionality of the ordinance, a question not open for our consideration, the questions argued by appellant are that the ordinance in question does not apply to the case at bar, and that he is entitled to the relief prayed for on the ground of irreparable injury. Appellees in reply make only one contention other than that pertaining to the constitutional question, namely, that no replication having been filed complainant admits all the material allegations in defendant's answer except those which admit allegations in the bill. The authorities cited on this proposition are those where the

hearing was had upon the answer and bill without proof. They are not applicable to a case like that at bar where the case is heard upon the pleadings and proof. In such a case the filing of the replication will be deemed to have been waived. (Piot v. Davis, 241 Ill. 434, 439; Jones v. Neely, 72 Ill. 449; Marple v. Scott, 41 Ill. 50.)

As it is not questioned that complainant under the circumstances will suffer irreparable injury, and the evidence sufficiently discloses that he will, the facts giving him right to equitable relief on that ground need not be discussed.

Nor is it questioned that the building department approved of the plans for the building and issued a permit to erect the same in accordance with such plans, and that the building commissioner through the chief of police stopped further construction of the work on the proposed building after the permit was obtained, and that since that time complainant has been unable to proceed with the construction of the building, and has been prevented from proceeding by the police officers of the City of Chicago.

The master found there was no change in such plans; that the application stated that the use to which the building would be put would be "office and store rooms, and the assembling of special instruments, no manufacturing;" that defendant had been engaged many years at another location in the city in the business of purchase and sale of highly technical mechanical instruments and sundry mechanical articles which were manufactured by other concerns and shipped from their factories to the customers of his firm, in most instances; that in certain instances parts of two or three devices were manufactured by concerns other than his firm and shipped to it and assembled by it for shipment to the consumer, but that the assembling of such parts for completing the instruments entailed no noise and re-

quired no power or machinery; that it is intended by appellant not to do manufacturing in said building, but to pursue the same line of business in the same way in the building to be constructed as theretofore conducted, the principal part of which has been conducted through mail orders that were filled by shipment mostly from other points than appellant's place of business.

It is conceded that more than one-half of the buildings on both sides of the street in the block in question are used exclusively for residence purposes and the complainant did not before obtaining such permit secure the consent of any property owners in said block.

The ordinance in question requires the written consent of the majority of property owners on both sides of the street in the block according to frontage before a permit will be issued for the construction of a building that is to be used for any of some 75 to 100 purposes enumerated in the ordinance. We need not enumerate them here for the evidence does not disclose that any of them include the uses for which the proposed building is intended. Counsel for appellees do not attempt to enlighten the court on that subject, or to point out grounds that justified the chancellor in dismissing the bill for want of equity. Accordingly the decree will be reversed with directions to grant an injunction restraining appellees from revoking the permit and from interfering with the construction of the building in accordance with the approved plans.

REVERSED AND REMANDED WITH DIRECTIONS.

Gridley, P. J., and Morrill, J., concur.

7 - 26062

CHICAGO TITLE AND TRUST COMPANY
et al.,
Complainants,

vs.

ISRAEL B. FERLMAN,
Defendant.

IN THE MATTER OF THE PETITION OF
ABRAHAM TERMAN,
Appellee,

vs.

IDA ZUCKERMAN and EMANUEL ZUCKERMAN,
Appellants.

224 I.A. 656

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Superior court of Cook County entered October 7, 1919, directing that a writ of assistance issue for the purpose of putting one Abraham Terman in possession of certain premises described in his petition for the issuance of the writ.

The record shows that a bill was filed to foreclose the lien of a certain trust deed upon the premises in question and the subsequent proceedings in the case, which culminated in a decree of sale November 25, 1917. This decree directed that the real estate described therein, which included the premises in question, be sold in case of the failure of defendants to pay the indebtedness thereby found due within five days from the date of the entry of the decree. It also provided that in case of a sale and a failure to redeem therefrom, as required by law, the defendants or whoever shall be in possession of the premises or any part thereof, shall upon production of the master's deed to said premises surrender possession to the holder of such master's deed and leave was given to such holder to apply to the court, after the making of the master's deed, for a writ of

assistance to obtain possession of the said premises.

Pursuant to this decree a sale of the real estate in question was made by the master in chancery December 21, 1917, and a report of said sale and of the distribution of the proceeds thereof was approved by the court December 27, 1917. The report shows that the premises were sold to one William Ohlhaber and the issuance of a certificate of sale to him. There was no redemption from this sale and the holder of the certificate became entitled to a master's deed upon the expiration of fifteen months from the date of the sale. September 9, 1919, pursuant to leave of court, Abraham Terman, who was the grantee of said Ohlhaber, filed his petition for a writ of assistance against several of the defendants in the foreclosure proceeding who were alleged to be in possession of portions of the premises. This petition recited the foreclosure proceedings and the provisions of the decree of sale above mentioned, and alleged that by virtue thereof the petitioner was entitled to immediate possession of the premises. Answers were filed to this petition and there was a reference to a master in chancery, whose report was filed October 9, 1919. This report sets forth the provisions of the decree of sale and finds the petitioner Terman entitled to the possession of the premises. Objections and exceptions were filed to this report, which were heard by the court and overruled. Thereafter the decree of October 7, 1919, was entered, from which this appeal has been prosecuted. The decree found that certain persons were in possession of portions of the premises in question and ordered and directed that a writ of assistance issue in accordance with the statutes and practice of the court, directed to the Sheriff of Cook County, Illinois, commanding that he put the petitioner, Abraham Terman, into possession of the respective portions of the premises described and occupied by the persons mentioned therein.

A reversal of this decree is sought upon the ground that Terman was not the holder of the master's deed and consequently not entitled to a writ of assistance. While it is true that William Ohlhaber, the purchaser at the master's sale, was the grantee in the master's deed, yet the record shows that he conveyed the property in question to the petitioner Terman, and we are of the opinion that by this conveyance the petitioner acquired all of the rights of the holder of the master's deed. The decree contemplated that defendants and all persons claiming under them should be divested of all rights in the premises in question and the delivery of possession of said premises to the persons entitled thereto. This decree was not fully satisfied until there had been a delivery of possession thereunder. Kessinger v. Whittaker, 82 Ill. 28. By express statutory provision the court was authorized to enforce its decree by such form of final process as the nature of the cause required. R. S., chap. 22, sec. 47. The issuance of the writ of assistance to the grantee of the purchase at the master's sale was a proper exercise of the power of the court. Lancaster v. Snow, 184 Ill. 534.

The order of the Superior court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

A majority of this court is agreed upon the ground that Tarpum was not the victim of the security's bad but intemperately was entitled to a writ of mandamus. While it is true that criticism directed, in moderation or the security's case, are the grounds in the security's case, yet the court must be satisfied the conduct of the security in the political trial, and by use of the judicial that by that conformance the petitioner deprived him of the judge of the security's case. The dissent maintained that authority and all persons citizens under this state entitled to exercise of all rights in the petition to obtain or the judicial to decide matter of with proceeding in the instant criminal history. This was with the not fully satisfied until there has been a hearing of" petitioner's complaint. Lawrence v. Tillinghast, 21 R.I., 61. By the time disability provision has been the petitioner to receive the duties by such law or trial process. I the nature of the action are valuable. Tr. 6, Abbr. 67, Tr. 13. The lawyers of the work of authority if the grounds of the proceeding in the security's case the a proper decision of the error of the court. Lawrence v. Tillinghast, 21 R.I. 1bid.

The order of the Superior Court is affirmed.

Affirmed.

Justices: Tr. Jr., and Tarpum, Jr., concur.

11 - 26148

CHICAGO TITLE AND TRUST COMPANY, et al.,
Defendants in Error,

vs.

ISRAEL B. PERLMAN et al.,
Plaintiffs in Error.

ERROR TO SUPERIOR COURT OF COOK COUNTY.

224 I.A. 656

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

By this proceeding plaintiffs in error seek to review the record of a certain foreclosure suit in the Superior court of Cook County. The bill was filed August 21, 1916, by the Chicago Title & Trust Company as trustee and William Ohlhaber to foreclose the lien of a trust deed dated June 22, 1910, given by Israel B. Perlman to secure his note of even date therewith for $13,000 with interest thereon until the maturity thereof at the rate of five and one-half per cent per annum. Complainant William Ohlhaber was the holder and owner of the note and trust deed. Plaintiffs in error with others were defendants and filed their answer. It is unnecessary to recite the pleadings in detail. After the case was at issue it was referred to a master in chancery, who filed his report November 23, 1917, finding that complainants were entitled to the relief prayed in their bill and recommending the entry of a decree of foreclosure. Plaintiffs in error were represented by counsel before the master, but offered no proof in support of their answer. No objections or exceptions were filed to the master's report.

Thereafter on November 23, 1917, the court entered its decree of foreclosure and thereby approved the master's report and directed a sale of the premises in the event of the failure of defendants to pay the indebtedness thereby found due within the time limited by the decree. No objections were made to the entry of this decree and no appeal taken therefrom. Defendants failed to

pay, and thereafter the premises were sold by the master in conformity with the law and the terms of the decree. The master's report of sale was duly approved by the court without objection on the part of any of the defendants.

The proceeds of the sale were not sufficient to satisfy the indebtedness established by the decree and left a deficiency of $799.92 in favor of the complainant Ohlhaber and of $5400 in favor of a junior encumbrancer. Thereupon notice was given to defendants, including plaintiffs in error, of an application for the appointment of a receiver, and December 27, 1917, an order was entered appointing a receiver of the premises in question and directing that the receiver give a bond in the sum of $2500 with surety to be approved by the clerk of the court and further ordering that the receiver have all the usual powers, rights and duties of receivers of mortgaged premises in chancery; that he collect the rents, issues and profits of the premises, keep the same in good repair, properly heated and lighted, and that out of the proceeds he redeem the premises from a sale for the taxes for the year 1916 and pay any taxes and assessments which became a lien prior to the entry of the decree of sale. The receiver took possession of the premises in question and performed his duties as required by the said order of appointment. No objection whatever was made to the appointment of the receiver or to the terms of said order of appointment and no appeal was prayed therefrom. Plaintiffs in error became tenants of the receiver and one of them acted as janitor of the premises in question under the receiver and was paid a substantial remuneration for his services. On April 4, 1919, the receiver filed his final report of receipts and disbursements. The receiver's report showed the payment by him of $337.15 for general taxes upon the mortgaged premises for the year 1917, which were a lien prior to the

entry of the decree of foreclosures; also a disbursement of $422.85 for the redemption of the mortgaged premises from a sale for general taxes of the year 1916. Both of these payments were made in conformity with the order appointing the receiver. The report further showed a balance on hand of $1153.88. The receiver's report was duly approved by the court April 5, 1919. The order of approval directed that the funds in the receiver's hands be applied to certain expenses of the receivership and to the payment of the deficiency due to the complainant William Ohlhaber, thereby exhausting the funds on hand, and discharged the receiver from further duty.

Sundry errors are alleged to have occurred in the proceedings, which we will consider in the order in which they are presented by the brief of plaintiffs in error. It is first alleged that the foreclosure decree did not find the exact sum due to the complainant William Ohlhaber. This contention is not sustained by the record. The decree of foreclosure, entered November 23, 1917, expressly found, by reference to the report of the master in chancery which was thereby confirmed, that there was due to the complainant Ohlhaber the sum of $14,012.92 and costs, including the fees of the master and the complainant's solicitors' fees. It was unnecessary that the decree make any more specific finding of fact in this respect, as the evidence was preserved by the master's report.

It is next urged that the decree of sale was erroneous in finding that plaintiff in error Ida Zuckerman was personally liable for the debt of the complainant Ohlhaber. This contention is not sustained by the record. The master's report found that said plaintiff in error acquired title to the premises in question

by a conveyance from the mortgagee, in which she expressly assumed and agreed to pay the indebtedness secured by the trust deed and notes hereinbefore mentioned. This rendered her personally liable for the indebtedness and would have justified execution against her. It does not appear that this liability was enforced against plaintiff in error, and therefore the question raised cannot be regarded as material at the present time, in view of the fact that the lien of the complainant was fully satisfied by the sale and payment of the deficiency by the receiver.

It is urged that the rents which were collected by the receiver belonged to plaintiffs in error, who were the owners of the equity of redemption. This proposition cannot be sustained, because the trust deed upon which the proceedings were based gave to the holder of the notes a lien upon the rents during the period of redemption. The proceeds of the sale were not sufficient to satisfy the lien in favor of the complainant Ohlhaber, and therefore it was proper that the rents collected by the receiver should be applied to the payment of the deficiency due him. The rents during the redemption period were pledged as a part of the security, and a grantee of land who has taken title subject to an existing lien of this character is not entitled to the rent as against the mortgagee after default. Townsend v. Wilson, 155 Ill. App. 303; First National Bank v. Illinois Steel Co., 174 Ill., 140.

Plaintiffs in error complain that the order appointing the receiver was entered without requiring the complainant to furnish a bond in conformity with the statute in such case made and provided. The statute upon which plaintiffs in error rely does not render a bond necessary "when for good cause shown, and upon notice and full hearing, the court is of opinion that a receiver ought to be appointed without such bond." No objections having

been made to the appointment of the receiver and it appearing that the receiver has fully and faithfully discharged the duties of his office and that due notice of his appointment was given, it must be presumed that for good cause shown the court did not see fit to require the complainant to furnish any bond in connection with his application. Numerous objections are made by plaintiffs in error to the receiver's bond. All of these objections should have been made in apt time in order to render the same effective if found to be meritorious. They cannot now be considered, in view of the fact that the receiver fully and faithfully performed his duties and has been discharged from any and all liability arising from his acts as such receiver.

Plaintiffs in error also assert that the receiver had no right or authority to pay the taxes, which were liens upon the premises prior to the entry of the foreclosure decree or to redeem the said premises from a prior tax sale, and insist that the order of the court directing the receiver to make such payments was unauthorized and void. This contention is not sustained by the authorities cited by plaintiffs in error in support thereof. These authorities have no application to the circumstances involved in the case at bar; therefore no attempt will be made to review them in detail. It is doubtless true that if the proceeds of the sale of the property had been sufficient to satisfy complainant's lien the appointment of the receiver would have been improper and his disbursements for taxes or other purposes would have been illegal, but a different situation exists in the case of a deficiency and the payment of taxes which were a lien at the time of sale and unpaid, in violation of the covenants of the trust deed and in the case of a tax sale which had been permitted contrary to the terms of the trust deed. This distinction was clearly indicated in the

[illegible] the qualities of the [illegible] and it is clearly that the testator was doing and intentionally disregarded the [illegible] of his estate and that his action in his qualifications was clear. It might be argued that the [illegible] show the court did not use its [illegible] the exceptions as through any need in connection with his qualifications. Numerous objections are made by plaintiffs in [illegible] to the executor's acts. All of these objections should also [illegible] made to get this as a matter to render the same effective if found to be meritorious. They cannot not be considered, in view of the fact that the testimony fully and distinctly positively sets forth [illegible] and has been discussed here and and all relating [illegible] this case as such presents.

Plaintiffs in error also assert that the receiver had no right or authority to pay the taxes, which were filed upon the premises which is the basis of the contention there is no reason the land proceeds from a policy for duty, and further that the order of the court directing the receiver to pay such property was unauthorized and void. The contention is not sustained by the authorities cited by plaintiffs in error in support thereof. These authorities have no application to the circumstances involved in the case at bar. Therefore we proceed will be made to review the in detail. It is contended that if the property of the estate of the property had been sold, in making computations the expenditures of the receiver would have been incurred and the disbursements for taxes or other purposes would not have been illegal, but a different situation exists in the case of a defaulting and the payment of taxes which were a lien on the land of the [illegible] and [illegible], in view of the priority of the [illegible] in the land and in the [illegible] of a [illegible] and [illegible] in the [illegible] of the [illegible] land. This distinction was already considered in the

case of Elliott v. Magnus, 74 Ill. App. 436.

We find no reversible error in the record; the several decrees and orders of the Superior Court mentioned in the foregoing opinion are affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

378 - 26552

LILLIAN L. KRUSPE, minor, by LAURA KRUSPE, her mother and next friend, Appellee, vs. FRANKLIN W. ROSE, Appellant.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

Appellant seeks the reversal of a judgment against him for $500 entered by the Circuit Court of Cook County in an action to recover damages sustained by plaintiff, who was struck by an automobile, alleged to have been driven by defendant on October 31, 1917. The accident occurred at or near the intersection of Fifty-seventh place and Normal avenue in Chicago. Reversal is sought upon the ground that the verdict and judgment are contrary to the weight of evidence. It is also urged that the court erred in giving certain instructions to the jury. No brief is filed by appellee.

The declaration alleged that defendant carelessly and negligently drove and operated his automobile at the time and place above stated, so that it ran into and collided with plaintiff, inflicting serious injuries, for which she demands damages. It is also averred that the automobile was being driven at an excessive rate of speed. Pleas of the general issue and denying ownership and operation were filed.

The evidence shows that the accident occurred as alleged and that as a result thereof plaintiff's thigh was broken, requiring surgical and hospital treatment for a considerable period. The actual expenses for this treatment incurred on behalf of plaintiff amounted to several hundred

dollars. The testimony shows that in several conversations occurring after the accident defendant not only did not deny his responsibility, but in fact offered to defray the expenses incurred by plaintiff in being cured of her injuries. Defendant does not deny that these conversations occurred, although giving a somewhat different version of what was said. It is impossible to reconcile these statements of defendant with his testimony given on the trial to the effect that he was not present at the time and place of the accident and that his automobile was not in use at that time. The latter statements were wholly uncorroborated.

We are satisfied that the verdict was not contrary to the manifest weight of the evidence but was abundantly sustained by uncontradicted and competent proof. We have examined the instructions given by the court and find no reversible error therein.

The judgment of the Circuit Court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

447 - 26621

McNEIL & HIGGINS COMPANY,
a corporation,
Appellant,

vs.

MARSHALL FIELD & COMPANY,
a corporation,
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

224 I.A. 656

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

The statement of claim in this case alleged, in substance, that plaintiff's claim is for the use and occupation of warehouse space described as sections G and H on the third, fourth, fifth and sixth floors of the building known as the Pugh Terminal Warehouse in Chicago, Illinois, and alleged that the space was occupied by defendant for certain fractional portions of the month of May, 1917, and that defendant promised to pay plaintiff a reasonable rent therefor, which it is alleged amounts to the sum of $458.33.

Defendant's affidavit of merits alleged that defendant entered into an oral agreement with the Pugh Terminal Warehouse Company for the use and occupancy of the premises described in plaintiff's statement of claim for the period therein mentioned and paid said Pugh Terminal Warehouse Company rent in accordance with their said agreement for said period, and that defendant never entered into any agreement, express or implied, with the plaintiff for the use and occupancy of the premises, as alleged in the statement of claim.

The abstract should set forth the substance of these pleadings, especially in view of the fact that the briefs of counsel are devoted largely to a discussion of their allegations.

This court is not required to search the record in order to ascertain the issues made by the pleadings. The case was heard by the court without a jury. The trial resulted in a finding and judgment in favor of defendant, which we are asked to reverse upon the ground that the judgment is contrary to the law and the evidence.

We have carefully examined the record and find no evidence of the existence of any contractual relations, express or implied between the parties hereto. The evidence, including the stipulation of the parties, shows that plaintiff was the lessee for a term of twenty years of certain space in the Pugh Terminal Warehouse, which included the sections mentioned in the statement of claim. Plaintiff exercised the privilege of cancellation given to it by the lease. It gave to the lessor a notice of cancellation to take effect May 1, 1917. Thereupon the warehouse company demised the space to defendant for a term commencing May 1, 1917. Subsequently plaintiff requested from the lessor permission to remain in the occupancy of the demised premises during the month of May, 1917, which was granted. It is agreed that both of the parties paid to the warehouse company the stipulated rent for the month of May, 1917, for the premises in question. Shortly after May 1, 1917, defendant was desirous of moving into the premises for which it had paid the rent and which were still occupied by plaintiff. Thereupon a conference was had between the representatives of the parties hereto and the manager of the warehouse. Defendant's agent asked for the space. The manager of the warehouse said to plaintiff's agent, "Can you do anything for them?", plaintiff's agent replied, in substance, that just as soon as plaintiff could vacate the floors, it would deliver the space to defendant. The work of vacating by plaintiff proceeded and defendant moved in from time to time

on May 9, May 14, May 25 and May 26 respectively. It is to be inferred that on May 26, 1917, plaintiff had entirely vacated and defendant was in possession of the entire space. This suit is brought for the recovery by plaintiff from defendant of a reasonable sum for the use and occupation of the premises in question by defendant during the month of May, 1917, but in effect seeks to determine which of them had the superior right to the possession of the space during that month. As already indicated, there was no contract whereby defendant was obligated to pay rent to plaintiff. Therefore there is no ground for recovery for the use and occupation of the premises. The action for use and occupation is founded upon a contract express or implied and the relation of landlord and tenant must exist between the parties. Dudding v. Hill, 15 Ill. 61.

Appellant contends that it was entitled to judgment because it is alleged that it had a right to the possession of the premises prior and superior to that of defendant. Appellee denies the prior and superior right of plaintiff and contends that the titles of the respective parties to the demised premises cannot be determined by the Municipal Court in an action of assumpsit for rent. This contention is sustained by King v. Mason, 42 Ill. 223. While the Municipal Court has abolished formal pleadings in fourth class cases, the law requires the filing of a statement of claim for the purpose of forming an issue to which the parties are to be confined in their evidence. Walter Cabinet Co. v. Russell, 250 Ill. 416; Ehnberg v. City, 271 Ill. 404. While it was doubtless inequitable for the lessor to collect and retain the entire rent from both parties instead of apportioning it between them, yet that consideration does not entitle plaintiff to a recovery.

[illegible] Duty 7, Duty 14, Duty 17 and Duty 20 respectively. It is to be [illegible] that on May 24, 1977, plaintiff had motorcycle repair [illegible] and defendant was in possession of the motor cycle. This [illegible] will be brought for the court's convenience by plaintiff from defendant at a reasonable cost for the use and maintenance of the premises in question by defendant during the month of May, 1977, but in [illegible] efforts made to determine which of them had the superior right [illegible] the possession of the cycle during that month. In [illegible] established, there was no material adverse interaction [illegible] the act took place. Therefore there is no cause for [illegible] the use and maintenance of the premises. The [illegible] the use and occupation in Zamora upon a monthly stipend [illegible] Duplat and the relation of landlord and tenant as it exists [illegible] between the parties. Jackson v. Duplat, 32 Ill. App. 3d.

Counsel's contention that it was violative to plaintiff's [illegible] it is simply that it had a right to the possession of [illegible] the premises prior and superior to that of defendant. Controlling [illegible] the judge and appellate right of plaintiff was evidence [illegible] the rights of the respective parties to the instant proceeding [illegible] to determined by the Municipal Court in a right of [illegible] for rent. This contention is without [illegible] Duty 7, [illegible], at 122. While the municipal court has established [illegible] placeholder in certain cases, the law requires the [illegible] of a statement of claim for the purpose of informing [illegible] the right the parties are to be entitled to their [illegible] [illegible] v. Donnelly, 4th Ill. App. 3d [illegible] v. Ziko, [illegible] Ill. App. 3d. While it was instituted improperly for the [illegible] the motions and orders the motion were from both [illegible] [illegible] of appellants is between them. For their [illegible] [illegible] [illegible] liability is a necessity.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

65 - 26712

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

MARY COLLINS,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

224 I.A. 656

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

The original record filed in this court December 29, 1920, shows that on December 17, 1920, an information was filed in the Municipal court of Chicago against the defendant, who is plaintiff in error here, charging her with stealing from the Boston Store certain articles of merchandise of the value of $15; that on the same day defendant was arraigned but no plea was entered as required by law; that the trial proceeded without any plea to the information, resulting in a judgment of guilty, followed by a sentence that the defendant serve a term of thirty days in the house of correction and pay a fine of $50 and costs of suit. A reversal is sought upon the ground that the court had no jurisdiction to enter judgment without the entry of a plea to the information.

It has been held in numerous cases that a trial without the entry of a plea is a nullity. Without the plea being entered there is nothing to be tried. People v. Goff, 211 Ill. App. 122; People v. McCarthy, 176 id. 499; Parkinson v. People, 135 Ill. 401.

A supplemental record was filed herein June 24, 1921, which shows that on May 16, 1921, a motion was made by the State's Attorney to amend the record in the case so as to make it speak the truth by showing that on December 17, 1920, defendant pleaded guilty to the charge against her. This motion was allowed May 25,

1921, when the court entered an order which recites the prior proceedings and the inspection by the court of a document called the "Judge's sheet," being a record kept by the judge himself, which shows that a plea of guilty was entered December 17, 1920. The order further recites that the record of the case as it then stood did not speak the truth, but that through the fault and misprision of the clerk the plea of guilty of the defendant was not entered in said cause, although made by defendant at the time of her arraignment. The court ordered that the clerk enter said plea of guilty on the record of said cause at the proper place, showing that when the said defendant, Mary Collins, was arraigned she pleaded guilty and that said plea of guilty be entered nunc pro tunc as of December 17, 1920.

Counsel for plaintiff in error now contends that even if the proceedings on May 25, 1921, were sufficient to show the entry of a plea, the record is still insufficient to sustain the judgment for the reason that it fails to show a compliance with section 4 of division 13 of the Criminal Code.

The only error assigned upon the record is based upon the alleged absence of a plea to the information. This error was corrected by the proceedings set forth in the additional transcript of record above mentioned. A contention which is covered by no assignment of error will not be considered. Van Pelt v. Sylvester, 217 Ill. App. 405.

The judgment of the Municipal court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

1972, when the county updated its zoning which outlines the varied zoning classifications and the requirements for the owners of a maximum minimal use "Wedge's manual." Below is a review done by the "Pledge Committee", which gives that a plan of policy was adopted December 17, 1970. The report further points that the owners of the land in it that signed did not speak the truth, but that through the fault and ambitions of the plans the plan of quality of the determined was not achieved in well means, although such by determined at the time of the zoning-area. The study endorses that the plans where that plan of policy as the result of such change as the people plans, whether that was the best determent, Mary Phillips, the managing the planned utility and that such plan of utility be reviewed upon its land on or December 17, 1970.

Toward the plaintiff in error was insisted that upon if the proceedings on May 20, 1971, upon application to grant the utility of a plan, the result be with insufficient to warrant the judgment for the owners that it plan is done a modification with section 4 of division 2d of the Zoning Ordinance.

The only error assigned upon the record is based upon the alleged absence of a plan in the Commission. This error was presented by the proceedings not until to the intermediate tribunal of appeal above mentioned. A motion to dismiss is insisted by an assignment of error will not be considered. See City v. Chicago, 219 Ill. App. 519.

The judgment of the Appellate Court is affirmed.

AFFIRMED.

Mr. Justice C. A. McCullough, J., dissenting:

89 - 26744

CHARLES C. SPOTSWOOD,
Appellant,

vs.

WILLIAM F. JACKSON,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

224 I.A. 657

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

The original statement of claim in this case alleged that the defendant, together with David H. Jackson and Andrew O. Jackson, his brothers, listed with plaintiff, a real estate broker, for sale or exchange, the premises known as number 831 Wilson avenue, Chicago, Illinois; that plaintiff introduced to them one Alphonse W. Huber; that on May 15, 1917, the defendants, by a written agreement with the plaintiff, promised to pay to him $7,000 as his commissions in the event that the proposed exchange of property between the defendants and said Huber was consummated. This agreement of May 15, 1917, was set forth in the statement of claim. It is in the form of a letter addressed to plaintiff, whereby the three Jacksons agreed to pay plaintiff a commission of $7,000 in cash for his services rendered, at the time of the consummation of the proposed exchange of the Clarendon Beach Hotel property, situated at 831 Wilson avenue, Chicago, subject to a mortgage of $130,000 for certain parcels of real estate in New Chicago, Lake County, Indiana, better described in the agreement of exchange between the Jacksons and A. W. Huber of Chicago. The concluding sentence of the letter was as follows: "It is expressly understood that this commission is to be paid when the titles are passed." The letter was signed by David H. Jackson personally. The signatures of his two brothers were affixed by him, acting in their behalf.

The statement of claim further alleged that on May 24th "defendants" and said Huber entered into a written agreement for the exchange of the property owned by the defendant for property owned by said Huber. This agreement was set forth in its entirety. It contains a description of the property owned by the Jacksons and recites that it is subject to an encumbrance of $130,000; that a second mortgage is to be obtained by said Jacksons for the sum of $30,000 on their property to be executed by Huber, and that brokerage fees or commission should be paid to Charles C. Spotswood by the respective parties hereto, "as heretofore agreed by them." This agreement was signed by David H. Jackson, Andrew O. Jackson and the defendant and said Huber. It was further alleged in the statement of claim that afterwards the Jacksons and each of them refused to consummate the transaction contemplated by the exchange contract; that Huber was at all times ready, willing and able to perform his part of the contract; that the default and refusal of the defendants to perform was through no fault of the plaintiff; that plaintiff had performed substantially all of the services by him to be performed in connection with the transaction; that the commissions to be paid to plaintiff by said defendants have been earned; that a demand had been made of the defendants for said commissions and that they had refused to pay.

The amended affidavit of merits filed by the defendant denied that he listed said premises with the plaintiff for sale or exchange; denied that he knew said premises were listed with the plaintiff for sale or exchange. He further denied that on May 15, 1917, he entered into a written contract with the plaintiff, and denied the existence of said contract. The defendant admitted the execution of the contract for exchange with Huber but denied that any of the Jacksons refused to consummate the deal, alleging that

said Jacksons found that said Huber could not or was not willing to carry out the terms of said contract, and denied that said Huber was at all times ready, willing and able to perform his part of said agreement. Thereafter plaintiff filed an amendment to his statement of claim, wherein he set forth that if the court should be of the opinion and find that the contract of May 15, 1917, set forth in plaintiff's statement of claim, was not duly executed by the defendants to this suit and that said David H. Jackson did not have authority to execute said contract on behalf of said William F. Jackson, that said Jacksons are jointly and severally liable to plaintiff for the usual, customary and ordinary charge made by real estate brokers in the city of Chicago for the procuring of the exchange contract set forth in plaintiff's statement of claim, which charges amount to $7500. An affidavit of merits was filed on behalf of defendant to said amended statement of claim, in which William F. Jackson denied his joint and several liability to the plaintiff for the amount claimed and denied that the usual, ordinary and customary charges for real estate brokers' services in such case amounted to $7500. The issues thus made were submitted to the court without a jury and at the conclusion of plaintiff's case the defendant moved the court to exclude the evidence of plaintiff and to find the issues for defendant. This motion was allowed and judgment was entered accordingly. This judgment was reversed by this court - Second Branch, (Spotswood v. Jackson, 218 Ill. App. 528) and the case remanded to the Municipal court for a further trial. The former opinion recites the testimony which was given on behalf of the plaintiff and held that the contract signed by David H. Jackson, being the contract dated May 15, 1917, was admissible in evidence as against the defendant, in view of the testimony of the latter

that his brother was "a partner in the deal with me acting as my agent under my instruction." The opinion further indicated that the plaintiff had abandoned his claim for a recovery based upon the contract of May 15, 1917, and based his claim on the theory of an implied contract. It was held that under the evidence submitted at the former trial the plaintiff had established a prima facie case and that the court should have denied the defendant's motion to find for him at the close of plaintiff's evidence and that defendant should have been required to put in his defense. The second trial of the case was before the court without a jury and resulted in a finding and judgment in favor of the defendant, a reversal of which is now sought.

The evidence shows that the defendant William F. Jackson and his two brothers above named entered into an agreement with Huber, dated May 24, 1917, whereby they agreed to convey to Huber certain real estate in Chicago subject to a mortgage of $130,000 "and to another encumbrance hereafter referred to." By this agreement Huber agreed to convey or cause to be conveyed to the Jacksons a large number of lots located in various additions to New Chicago, Lake County, Indiana. The lot and block numbers are shown in detail in a schedule attached to the contract. Huber also agreed to convey to the Jacksons the entire holdings of the New Chicago Ice and Supply Company, an Indiana corporation, with adjacent switch tracks on the Joliet & Northern Railway and all riparian rights and rights to cut and harvest ice along Deep River, for a period of thirty years from December 15, 1914. These holdings included certain real estate, buildings, tools and ice crop. Huber also agreed to convey the premises known as the "Huber Building," consisting of a modern two-story flat, store

and garage building situated in New Chicago, Indiana, including a triangular piece of ground immediately north of said building. He also agreed to transfer to the Jacksons all accounts receivable, consisting of various contracts for deeds in the course of collection on the instalment plan arising from sales of certain lots in the various subdivisions above mentioned representing about forty per cent of the purchase price, from which it is to be inferred that an average of sixty per cent had been paid upon these contracts. He also agreed to transfer to the Jacksons a contract with the School Board of New Chicago for a public school building amounting to the sum of $6500; also a certain other contract amounting to $1,000; also certain building material, horses and wagons and the office furniture located in the Huber Building. It was further mutually agreed that in the event the title to any of the real estate of either of the parties being found defective, unless the party or parties to take such real estate waived such defects, "this contract is to be cancelled and all claims for damages by reason of the non-fulfillment thereof are in such event hereby expressly waived."

Appellee claims that by reason of the execution of this contract he is entitled to a commission of $7500, being at the rate of two and one-half per cent on $300,000, which is claimed to be the value of the property owned by the Jacksons, although the record contains no evidence establishing such value. It is claimed that the Jacksons are precluded from denying that the appellee is entitled to a commission on account of the following provision contained in the exchange contract: "It is further mutually agreed that brokerage fees or commissions shall be paid to Charles C. Spotswood by the respective parties hereto, as heretofore agreed between them and said broker." It is admitted that the transaction between Huber and the Jacksons contemplated by the exchange contract of May 24, 1914, was never consummated. We believe that by the use of the

words "as heretofore agreed between them and said broker," with reference to Spotswood's commission, it was the intention of the parties to refer to the agreement of May 15, 1917, which provided for a commission of $7,000, payable when the titles were passed. Defendant William F. Jackson has repudiated this agreement and stated that his name was signed to the same by his brother David H. Jackson without any authority from him. The evidence shows, as was stated in the former opinion, that David H. Jackson was the brother ofWilliam F. Jackson. While there is some doubt as to the lack of authority on the part of David H. Jackson to sign this agreement on behalf of the defendant, a decision of that question is unnecessary. If the reference in the exchange contract to the payment of brokerage "as heretofore agreed" did not refer to the written agreement of May 15, 1917, it probably referred to the oral agreement made by David H. Jackson on behalf of himself and his brothers, which was substantially the same as that set forth in the letter of May 15, 1917. The evidence shows that David H. Jackson told Spotswood that no commissions would be paid unless the transaction was closed and refused to make any agreement to pay commissions under any other conditions. We are of the opinion, therefore, that plaintiff is precluded from any recovery of commissions in this case by virtue of his express agreement that no commission should be payable until the transaction was closed.

Appellant further contends that he is entitled to his commission because he produced a customer with whom the Jacksons entered into a valid, binding and enforceable agreement for the exchange of real estate and that nothing further remained to be done by him in order to earn his commission. It has been held in a number of cases that an agent is entitled to his commission when he has produced a customer and both parties have entered into a valid

and enforceable exchange contract and one of the parties refuses to proceed. Fox v. Ryan, 240 Ill. 391; Kilnon v. Mason, 158 Ill. 304. While this proposition is not disputed by appellee, he contends that the appellant is not entitled to his commissions because the contract with Huber was not valid, binding and enforceable. An investigation of Huber's title to the various lots in New Chicago, which he proposed to convey to the Jacksons, showed that the title to all but two of said lots was vested in a certain Indiana corporation called the "New School Real Estate and Investment Company," and that the title to the remaining two of the lots was vested in certain School Trustees. These titles, however, were subject to numerous reservations shown of record, an outstanding tax title, proceedings to enforce the collection of special assessments and outstanding interests of various kinds. It was shown that the sales contracts which Huber proposed to transfer to the Jacksons had not been paid up to the average amount of sixty per cent of their face value, but that payments thereon amounted to only forty-six per cent of the face amount of the contracts on an average. It was also shown that the instrument which is described in the exchange contract as an agreement with the School Board of New Chicago for the construction of a public school building, on which there was represented to be due the sum of $6500, was in reality a lease. In other words, Huber had seriously misrepresented the extent, character and value of the property which he proposed to convey to the Jacksons. No attempt seems to have been made by Huber to comply with his covenants and agreements and no tender of deeds was made by either party. It seems apparent that the contract was not enforceable as against Huber. The transaction was abandoned, evidently in compliance with the provision in the exchange contract which has heretofore been quoted whereby, in case of defective titles and no waiver of such defects, the contract was to be

cancelled and all claims for damages by reason of the non-fulfillment of the contract were expressly waived. It is obvious that no other course could have been pursued. It would have been impossible for the Jacksons to have maintained a bill for specific performance based upon the contract or to have recovered damages from Huber, as damages were expressly waived.

It is also urged by appellee that plaintiff cannot recover in this case because he was the representative of Huber and that the defendant had no knowledge that plaintiff had been employed by the other party to the agreement and had not consented to such employment. The evidence is undisputed that defendant had had no dealings whatever with plaintiff until after the execution of the exchange contract and had no knowledge of plaintiff's relations with Huber. As already indicated, the property belonging to the Jacksons was never listed with plaintiff, but the property belonging to Huber was so listed. It has been frequently held that an agent cannot recover commissions from one party to an agreement of this character when he was already in the employ of the other party without the knowledge and consent of the former. Bunn v. Keach, 214 Ill. 259. The same man cannot act as agent for both seller and buyer, as his duty to one is inconsistent with his duty to the other. Warrick v. Smith, 137 Ill. 504. Such a double employment is permissible only where it is mutually understood that the broker has a right to commissions from both parties to an exchange contract. This rule was applied in the case of Friestedt v. Dietrich, 84 Ill. App. 605, where there was an agreement for the exchange of real estate, wherein the parties agreed to divide the payment of the commissions between them, each being obligated to pay a certain fixed portion thereof. Such a mutual understanding and agreement was entirely absent in the case at bar.

We are of the opinion that the plaintiff was not entitled to a recovery in this case either upon the theory of an express or an implied contract and that the Municipal court did not err in finding the issues for the defendant.

The judgment of the Municipal court is affirmed.

AFFIRMED.

Gridley, P. J., concurs;

Barnes, J., took no part in the decision of this case.

97 - 26753

ABE ALLEN,
Appellee,

vs.

THE HOME INSURANCE COMPANY
OF NEW YORK, a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

224 I.A. 657

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

Suit was brought by appellee to recover damages to a certain automobile belonging to him pursuant to the terms of a policy of insurance thereon. The statement of claim alleged that on May 13, 1920, the automobile was stolen and that when it was recovered on May 14, 1920, it was so damaged that it became necessary for plaintiff to spend $400 for repairs and tools; that said automobile was insured with the Home Insurance Company under policy No. 81736, issued April 9, 1920; that defendant, although often requested, had failed to reimburse plaintiff for his said loss. Defendant's affidavit of merits sets forth the policy of insurance in full and denies in detail the allegations of the statement of claim. The case was heard by the court without a jury, resulting in a finding and judgment for plaintiff for $189 and costs.

Appellant contends that there should be a reversal for the reason that the statement of claim failed to set forth a cause of action. All that is required in a statement of claim in an action of the fourth class in the Municipal Court is that the nature of the claim shall be stated and such further information given as will reasonably inform defendant of the nature of the case he is called upon to defend. Enberg v. City of

Chicago, 271 Ill. 404. We think that the statement of claim in the case at bar was sufficient to show the nature of the case and gave to defendant the necessary information, enabling him to determine the character of the claim it was called upon to defend.

It is also urged as a reason for reversal that it was the duty of the insured to furnish notice and proof of loss in conformity with the requirements of the policy, which were to the effect that, in the event of loss, the assured should forthwith give written notice to the company and within sixty days thereafter render a verified statement to the company stating the knowledge and belief of the assured as to the time and cause of the loss or damage. It is admitted that this written notice was not given, but it appears from the evidence that the owner of the machine in question called upon the agent of the insurance company with whom he had arranged for the issuance of the policy. This agent apparently communicated to defendant the fact that there had been a loss and that a claim was being made under the policy. This appears to have been the case, because later plaintiff called at the office of the insurance company and interviewed the manager, who seemed to be fully advised about the loss and expressly disclaimed liability. His conversation indicated that he had received actual notice of plaintiff's claim. A denial of liability and a refusal to pay damages after actual notice is a waiver of the requirements of the policy as to giving notice. St. Onge v. Hartford Fire Ins. Co., 204 Ill. App. 127; American Ins. Co. v. Keefer, 208 id. 571.

It is also contended by appellant that there was no evidence of any loss as the result of "theft, robbery or

Dickson, 273 III. 601. We think that the statement of claim in the case at bar was sufficient to show the nature of the loss and give to defendant the necessary information, enabling him to determine the character of the claim if his liability were in dispute.

It is also argued as a reason for reversal that it was the duty of the insured to furnish notice and proof of loss in conformity with the requirements of the policy, which were in the after that, in the event of loss, the insured should forthwith give written notice to the company and within sixty days thereafter render a written statement to the company showing the knowledge and belief of the assured as to the time and cause of the loss or damage. It is contended that this written notice was not given, but it appears from the evidence that the owner of the machine in question called upon the agent of the insurance company with whom he had arranged for the insurance of the policy. This agent subsequently communicated to defendant the fact that there had been a loss and that a claim was being made under the policy. This company to have been the same, because later plaintiff called at the office of the insurance company and interviewed the manager, who denied to be fully informed about the loss and expressly disclaimed liability. The communication particular loss is not required without notice of plaintiff's claim. A denial of liability and a refusal to pay damage given without notice is a waiver of the requirements of the policy in the written notice. Id. Cyc. v. Hartford Fire Ins. Co., 98 III. App. 117; Continental Ins. Co. v. Dexter, 60 Ia. 141.

It is also contended by appellant that there was no evidence of any loss to the property of "Ebert", insured by

pilferage" within the meaning of these terms as used in the policy, and that in order to render defendant liable the loss or damage must arise from a taking with the intention of permanently depriving the owner of his property. The evidence shows conclusively that the automobile in question was unlawfully taken from the possession and control of plaintiff and kept for a considerable period of time, or in other words, that the automobile was stolen. The fact that it was subsequently recovered does not alter the character of the original taking.

We have carefully examined the evidence in the case and find that the judgment is fully sustained by competent proof. It was not contrary to the manifest weight of the evidence.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

26769

112 - 26769

ASHLEY D. FITTZ,
Appellee,

vs.

FELIX MARTIN and FRANK J. BUCKLEY,
Copartners Doing Business as HOME
SUCH CARTAGE COMPANY,
Appellants.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

224 I.A. 657

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

Appellants seek the reversal of a judgment against them for $1,000 entered by the Municipal court of Chicago in an action to recover damages sustained by the plaintiff, who was struck by a motor truck alleged to have been owned by appellants and operated by their servant. The accident occurred at about four o'clock p. m. December 28, 1918, at the intersection of State and Congress streets in Chicago. The case was heard by the court without a jury. It is urged as reasons for reversal that the judgment was contrary to the preponderance of the evidence and that the damages awarded are excessive.

The evidence shows that the accident happened at the time and place above stated. Plaintiff had started to cross State street from the west to the east side, walking on the north crosswalk of Congress street. He progressed as far as the west street car track on State street, where he stopped to allow a southbound car to pass him. While waiting there he was struck by the motor truck in question and sustained the injuries of which he complains. Plaintiff testified that the motor truck had swung out from behind the southbound car; that he saw it when it was twenty feet away; that it was traveling from sixteen to twenty miles an hour; that he tried to get out of the way by returning to the walk but was prevented by the motor truck; that he seized hold of the bumper of the truck and was dragged across Congress street a distance of

approximately fifty feet or more. This testimony is practically undisputed and is corroborated to a considerable extent by that of the police officer stationed at the corner.

The only disputed part of plaintiff's testimony seems to be that which refers to the rate of speed at which the truck was travelling at the time of the accident. One witness for defendant testified that the truck was going from six to eight miles an hour. This witness was on the rear of the truck and did not see the accident. Owing to the fact that the truck did not stop until it had crossed Congress street, which is seventy-five feet wide, it is a fair inference that the truck was being driven at a rate of speed in excess of ten miles an hour. The vicinity of State and Congress streets is a closely built up portion of the business district of Chicago, where a rate of speed in excess of ten miles an hour is prima facie evidence that the vehicle is running at a greater rate of speed than is reasonable and proper. R. S., chap. 121, sec. 249v.

Appellants contend that the judgment cannot stand because, as they allege, it rests upon the unsupported testimony of plaintiff, citing Broughton v. Smart, 59 Ill., 440, and Peaglee v. Glass, 61 Ill. 94. These authorities cannot be followed in this case. The judgment does not rest upon the testimony of the plaintiff solely. His testimony was corroborated by that of the police officer, who saw the accident, and in some particulars by that of defendant's only witness. We think that the evidence was amply sufficient to sustain the judgment.

It is urged that the judgment was excessive in view of the fact that plaintiff was fortunate enough to escape serious injury. We see no merit in this contention. Plaintiff was earning $4500 a year. The accident prevented him from attending to his business for seven or eight weeks, making a loss of earnings of

superficially dirty face or hands. This sentiment is questionably sincere and is motivated by a considerable amount of fear of the passive citizens assisting on the sidewalk.

The only discernible part of protestant's face that may seem to be that which lacks to the rule of equal is which the cheek was brandished as the face of the sentiment. The reference the defendant realizes that the image you judge first sir is which which on seeing this witness that on the face of the black and sir not the same man. Going to the jury that you cannot not see any sign such? Is not without footprint sheets, which is irrelevant that this, is a fair interpose that the image not being driven on a rule of equal in spite of not which on seen. The criminal of force and dangerous criminal is a closely half by position of the footprint charged of fifteen. Since a sole of equal is spite of the which on face is not the fifteen fight without that the criminal is fleeing at a position time equal than is reasonable and without. Is, the, judge, the, the, the, defendants counsel that the footprint cause about the verse, as they allege, is made upon the commonwealth testimony of reliability, citing Commonwealth v. Jones, 8 Ill., 2d, 1, 2 Illinois, 8 Ill., 2d. These authorities cannot be pointed to this case. The footprint does not rest upon the testimony of the victim alleged crime. The testimony was introduced by that of the police officer, who saw the evidence, and is then corroborated by that of defendant's only witness. We think that the witness has sufficiently established to receive the footprint.

It is argued that the footprint was insufficient to prove the that the physicality was furnished sound by people making the jump. In one we agree to this contention. Possibly the jumping sound a jump. The evidence concerning the fact examination is his testimony the sound of other prints, showing a type of footprint of

over $600. His wearing apparel was ruined, involving a loss estimated at $75, which is not unreasonable. The remainder of the judgment is not an excessive allowance for pain and suffering.

Appellants also contend that their ownership and operation of the truck were not proved. The allegations in the statement of claim with reference to these facts were not put in issue by the affidavit of merits, and therefore were admitted under the rules of the Municipal court, which are a part of the record. We find no reversible error in the record.

The judgment of the Municipal court is affirmed.

AFFIRMED.

Gridley, P. J., concurs.

Barnes, J., took no part in the decision of this case.

118 - 26775

MARTHA MARKOS,
Appellee,

vs.

PIONEER STATE SAVINGS BANK,
a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

224 I.A. 657

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

The statement of claim alleges in substance that defendant is the proprietor of certain safety deposit vaults from whom plaintiff had rented a safety deposit box for several successive years; that plaintiff had paid regularly the annual rental of the box, which was $5 per year; that she deposited $500 in said box; that defendant permitted some person unknown to plaintiff to take said money from the box without the knowledge or consent of plaintiff, and that as a result, said sum of money became lost to plaintiff.

Defendant's affidavit of merits admits its ownership of the vaults and the renting of the box to plaintiff and the payment of the rental therefor as alleged by her; avers that defendant had no knowledge as to the contents of the box; denies that it permitted any person other than plaintiff or her duly authorized representative to open said box; denies that money or any other property belonging to plaintiff was taken from the box by any person or persons other than said plaintiff or her duly authorized representative, but on the contrary alleges that defendant exercised ordinary diligence, as it was required to do under the rental contract to prevent the opening of said box by any person other than plaintiff or her representative.

There was a jury trial of the case which resulted in a verdict on April 19, 1919, in favor of plaintiff for the sum

The statement of claim alleges in substance that defendant is the proprietor of certain safety deposit vaults from whom plaintiff had rented a safety deposit box for payment consideration; that plaintiff had paid regularly the annual rental of the box, which was $5 per year; that she deposited $1000 in said box; that defendant permitted some person unknown to plaintiff to take said money from the box without the knowledge or consent of plaintiff, and that as a result, said sum of money became lost to plaintiff.

Defendant's attorney of motion asserts the ownership of the vaults and the renting of the box to plaintiff and the payment of the rental therefor as alleged by her; avers that defendant had no knowledge as to the contents of the box; insists that it permitted any person other than plaintiff or her duly authorized representative to open said box; denies that money or any other property belonging to plaintiff was taken from the box by any person or persons other than said plaintiff or her duly authorized representative to open said box; denies that money was taken from the box by any person other than plaintiff or her representative.

There was a jury trial of the case which resulted in a verdict on April 10, 1930, in favor of plaintiff; the case

of $500. Thereafter the court set aside this verdict and granted a new trial. The statement of claim was then amended, alleging a demand by plaintiff and a refusal by defendant to return the money. The case was again heard by a jury. The second trial resulted in a verdict in favor of plaintiff. A reversal is sought upon the ground that the judgment is contrary to the weight of the evidence.

Plaintiff testified that she deposited her savings in the box from time to time during the period from 1913 to 1917; that the last time she made such a deposit was January 5, 1917, and that she then had in the box $500 in paper money, which she counted at that time and found intact. She did not draw any money out of the box after January 5, 1917. She had two keys to the box which she kept with her at all times either in a mesh bag, which she carried with her or which was kept in a dresser drawer. She apparently lost or mislaid the keys. She looked for them July 12, 1917, but could not find them. She had not missed them prior to that date. That plaintiff lost the keys is undisputed. She notified the bank of the loss of the keys on that date and the box was then opened by drilling. The box could not have been opened otherwise except by the joint use of one of plaintiff's keys and a guard key kept at all times by defendant. There was no money in the box, when it was opened by the drilling process July 12, 1917, in the presence of both parties. On behalf of defendant four employes of the bank testified as to the manner in which the guard key was kept. It was shown that very great care was displayed by defendant in the safe keeping of the guard key so as to prevent its use by anyone except defendant's employes, all of whom seem to have been trustworthy. These employes at various times had waited upon customers during the period between January and July, 1917. Each of them testified that no one had been allowed access to the box at any time except plaintiff or

of fact. Therefore the court can make this verdict and grant a new trial. The statement of claim was then amended, alleging a demand by plaintiff and a refusal by defendant to return the money. The case was again heard by a jury. The second trial resulted in a verdict in favor of plaintiff. A reversal is sought upon the ground that the judgment is contrary to the weight of the evidence.

Plaintiff testified that she deposited her savings in the box from time to time during the period from 1913 to 1917; that the last time she made such a deposit was February 2, 1917, and that she then had in the box $500 in paper money, which she counted at that time and found intact. She did not draw any money out of the box after January 8, 1917. She had two keys to the box which she kept with her at all times either in a mesh bag, which she carried with her or which was kept in a drawer from which she carefully kept or misplaced the keys. She looked for them July 12, 1917, but could not find them. She had not missed them prior to that date. Each plaintiff lost the keys in questions. She replaced the lock of the box at her own expense on that date and the box was then opened by drilling. The box could not have been tampered otherwise except by the joint use of the of plaintiff's keys and a guard key kept at all times by defendant. Every one entering in the bank, when it was opened by the drilling process July 12, 1917, in the presence of both parties. On behalf of defendant four employes of the bank testified as to the manner in which the guard key was kept. It was shown that every entry was discovered by defendant in the act keeping of the guard key or in the general use by income service enumerator's employes, all of whom were in have been trustworthy. Their employes at various times had waited upon customers during the period between January and July, 1917. Each of them testified that no one had

her representative. The evidence further shows that defendant kept its own money and other valuable assets in a box in these vaults and that defendant employed exactly the same precautions in safeguarding plaintiff's box that it used with reference to the box that contained its own valuables. In other words, it is claimed that defendant exercised the same degree of care and diligence in the preservation of the plaintiff's property that it took of its own assets of a similar character. This contention is refuted solely by the fact that plaintiff's money had been removed from her box, while that belonging to defendant remained undisturbed in its receptacle. The evidence does not show how or under what circumstances plaintiff's money was taken from her box. No specific act of negligence on the part of defendant was proved.

Practically the same question was involved in the case of Schaefer v. Safety Deposit Co., 281 Ill. 43. The circumstances of that case were substantially the same as those involved in the case at bar. The box was in the exclusive control of the defendant and the plaintiff could not obtain access to it except by giving her key to the person in charge of the vaults. In the Schaefer case, the contract provided, in substance, that the liability of the company operating the vaults was expressly limited to the exercise of ordinary diligence to prevent the opening of the box by any person other than the renter or his duly authorized representative and that such opening should not be inferable from the loss of any of the contents of the box. The contract involved in the case at bar contained a similar provision. The evidence on behalf of the defendant in the Schaefer case, as in the case at bar, showed the watchfulness exercised by it over the vaults and tended to prove that no person other than the plaintiff had had access to the box in question. Under such circumstances the court held that where a bailee receives property and fails to

return it, the presumption arises that the loss was due to his negligence and the law imposes upon him the burden of showing that he exercised the degree of care required by the nature of the bailment (citing authorities). The court said (p. 51), "To call upon the plaintiff under such circumstances to prove some specific act of negligence by which her money was lost and which she must necessarily prove by defendant's employes would impose upon her a practically impossible burden."

It is urged by appellant that the rule established by that decision was modified by the decision in Miles v. Hotel Co., 289 Ill. 320, and that the evidence offered by defendant tended to show that it was not negligent, so that the burden remained on plaintiff to show that defendant was in fact negligent, and that its negligence caused the loss or contributed thereto. In the case cited by defendant the bailment was gratuitous, and in that respect differed from the bailment in the case at bar. In the Miles case, after defining ordinary diligence on the part of a bailee to mean "that degree of care, attention or exertion, which, under the circumstances, a man of ordinary prudence and discretion would use in reference to the particular thing were it his own property," as held in the Schaefer case, the court said:

> "The weight of modern authority holds the rule to be that where the bailor has shown that the goods were received in good condition by the bailee and were not returned to the bailor on demand the bailor has made out a case of prima facie negligence against the bailee, and the bailee must show that the loss or damage was caused without his fault. (Cumins v. Wood, 44 Ill. 416; Schaefer v. Safety Deposit Co., supra.) The effect of this rule is not to shift the burden of proof from plaintiff to the defendant but simply the burden of proceeding. The bailor must in all instances prove that the bailee was negligent, but when she shows that the goods which she intrusted to the bailee's care were not delivered upon demand she has made out a prima facie case or created a presumption of negligence which the bailee may overcome by offering evidence to show that it was not negligent, and if it produces such evidence, the bailor, in order to make out her case, must show that the bailee was, in fact, negligent and that its negligence caused the loss or contributed thereto. It was held in Sanborn v. Kimball, 106 Me. 355, that the bailee has sufficiently exonerated himself from liability when he has shown that the cause of the loss was a mystery."

-4-

return it, the presumption raises that the loss was due to his negligence and the law imposes upon him the burden of showing that he exercised the degree of care required by the owner of the bailment (citing authorities). The court said (p. 22):

"By this rule the liability under such circumstances is prima facie specific not of negligence by which her money was lost and which she must necessarily prove to establish negligence would impose upon her a practically impossible burden."

It is urged by appellant that the rule established by that decision was modified by the decision in Miles v. Davis Co., 221 Ill. 197, and that the instructions offered by defendant should be where that it was not negligent, or that the jurors reasonably wondered to whom that defendant was in fact negligent, and that the negligence caused the loss or contributed thereto. In the case cited by defendant the bailment was gratuitous, and in that respect differed from the bailment in the case at bar. In the Miles case, after declaring ordinary diligence on the part of a bailee is some "high degree of care, effective to overcome, which, under the circumstances, a man of ordinary prudence and discretion would use in reference to the particular thing as his own property," as held in the Commercial case, the court said:

"The judges of modern authority hold the rule in the case where the bailor has shown that the goods were delivered in good condition by the bailee and were not returned to the bailee on demand the bailee has made out a case of prima facie negligence against the bailee, and the bailee must show that the loss or damage was caused without the fault. (Lorenz v. Jewel, 24 Ill. App. 1; Illinois Central R. Co. v. Cobb, 64 Ill. 128; The effect of this rule is not to shift the burden of proof from plaintiff to the defendant but simply the burden of proceeding. The bailor must in all instances prove that the bailee was negligent, but when the bailor has shown that the goods were delivered to the bailee in good condition and not returned on demand the bailee must show that he was not negligent. (Illinois Central R. Co. v. Cobb, supra). In order to show that it was not negligent, the bailee must show that the bailee was, in fact, negligent and that the negligence caused the loss or destruction. If one bailee is guilty of [illegible] v. [illegible], 127 Ga. 124, 56 S.E. 1[illegible]

Appellant contends that it has shown compliance on its part with all the requirements indicated by the rules established in both of these decisions, in showing its watchfulness of the guard key and the vaults, and particularly by proving that it took the same degree of care of plaintiff's property that it took of its own, and that it should be exonerated from liability, having "shown that the cause of the loss was a mystery."

While it must be admitted that the words used in these two decisions are somewhat conflicting, and that there is some ground for urging, as appellant has done, that the rule as to the liability of a bailee as established in the Schaefer case was modified by the later decision in the Miles case, we do not feel justified in so holding, especially as the later decision does not in express terms overrule the former. We believe that the apparent conflict in the conclusions reached was due to the difference in the circumstances involved in the two cases. One was a gratuitous bailment and the other was for hire. In the Miles case the subject-matter of the controversy was a trunk and its contents, which plaintiff alleged she had left with defendant for safekeeping when she went away from defendant's hotel, where she had been a guest for several months and to which there was a probability of her returning as such guest at some indefinite future date. There was a judgment in favor of plaintiff for $1,000. The defendant denied that it ever received the trunk and there was no evidence to show that it did so receive it. Plaintiff had no check to show for it. Her testimony as to the delivery to the defendant was inconclusive. Her failure to obtain a check for the trunk was unexplained. Even if the trunk hadbeen put in defendant's care, under the circumstances alleged by plaintiff, the defendant could not be presumed to know that an old trunk of the size of the one in controversy with its contents

Appellant contends that it has taken compliance on its part with all the requirements initiated by the order established in both of these decisions. In showing the weaknesses of the guard hoy and the vestibule, and particularly by proving that it has the same source of supply of electricity, property that is back of the eye, and that it should be exonerated from liability, having "shown that the cause of the loss was a mystery."

While it must be admitted that the words used in these decisions are somewhat conflicting, and that there is some grounds for criticism, we apprehend that the rule as to the liability of a bailee as established in the Hawkins case was modified by the later decisions in the Miller case, so as not fairly justified in so holding, especially as the later decision does not in express terms overrule the former. We believe that the apparent conflict in the annotations referred to was due to the difference in the circumstances involved in the two cases. One was a gratuitous bailment and the other was for hire. In the Miller case the subject-matter of the controversy was a trunk and its contents, which plaintiff alleged the had left with defendant for safekeeping while she went from Interurban's house, where she had been a guest for several months and to which place was a possibility of her returning as a guest at some indefinite future date. There was a judgment in favor of plaintiff for $1,000. The defendant denied that it ever received the trunk and claimed and was prepared to show that it did not receive it. Plaintiff had no right to show for it. Her testimony as to the delivery to the defendant was incompletely. Her failure to obtain a check for the trunk was unexplained. Even if the trunk had been put in defendant's care, where the circumstances alleged by plaintiff, the defendant could not be presumed to have for an

was worth over $1,000 (p. 328).

In the case at bar it was the duty of defendant to see that no one except the plaintiff or her duly authorized representative had access to the box in question. This duty arose from the nature of the business conducted by defendant. Defendant was obligated to identify any person presenting a key to the box and demanding access to it, as one entitled to the possession of the key and its use in opening the box. Plaintiff had a right to rely upon the performance of this duty by defendant. If defendant is relieved from this obligation, then there is no protection to the renter of a box. The nature of defendant's undertaking was such that it cannot be relieved from liability in a case where it has permitted any person other than the renter or the duly authorized representative of the renter to have access to the box. This was the rule established in the Schaefer case, which was recognized by this court in Koczora v. Standard S. D., 221 Ill. App. 43.

As was said in Masonic Temple S. D. Co. v. Langfelt, 117 Ill. App. 652:

> "What constitutes reasonable care in the particular case depends upon the circumstances, upon the nature of the company's undertaking, upon the confidence which it invites, and upon the value and character of the deposit entrusted to its care. * * * A safe deposit company holds out to the public the implied agreement that property placed in its custody will be protected, so far as reasonable human foresight will permit, from the ordinary dangers to which valuables, whether in the shape of money, bonds, jewelry or other forms, are exposed, through the cupidity and daring of those who, as experience shows, are always on the lookout to possess themselves of the property of others by fraud or criminal violence."

The evidence in the case at bar presented two alternative conclusions to the jurors so far as the plaintiff's testimony was concerned. It must have been true or false. If false, the plaintiff would have been precluded from her recovery. Plaintiff's testimony was undisputed and two juries have based their verdicts upon its truthfulness. If plaintiff's testimony was true, there

was worth over $1,000 (p. 208).

In the case at bar it was the duty of defendant to see that no one except the plaintiff or her duly authorized representatives had access to the box in question. This duty arose from the nature of the business conducted by defendant. Defendant was obligated to identify any person presenting a key to the box and demanding access to it, or one entitled to the possession of the key and the box in opening the box. Plaintiff had a right to rely upon the performance of this duty by defendant. If defendant is relieved from this obligation, then there is no protection to the renter of a box. The nature of defendant's undertaking was such that it cannot be relieved from liability in a case where it has permitted any person other than the renter or the duly authorized representatives of the renter to have access to the box. This was the rule enunciated in the Schaefer case, which was promulgated by this court in Zimmerman v. Chandler L. J., 111 Ill. App. 24.

As we read in Guaranty Trust Co. v. Chandler, 117 Ill. App. 488:

> "that constitutes reasonable care in the particular case depends upon circumstances, upon the nature of the company's undertaking, upon the particular object it undertook, and upon the value and importance of the property entrusted to its care. * * * a safe deposit company holds out to the public the implied assurance that property placed in its custody will be protected, as far as reasonable human foresight will permit. From the ordinary dangers to such property, whether it be the claim of bona fide owners, jewelry or other items, are exempted, through the fidelity and caution of their who, in ordinary cases, are always on the lookout to secure immunity of the property of others by fraud or criminal violence."

The evidence in the case at bar presented the alternative questions to the jurors as far as the plaintiff's negligence was concerned. It must have been duty or fault. If fault, the plaintiff would have been precluded from her recovery. Plaintiff's testimony was challenged and the jurors have found that her evidence

was no escape from the conclusion that the loss of money was due to defendant's negligence in permitting someone other than plaintiff or her representative to have access to the box. There is no "mystery" about the cause of plaintiff's loss, although the identity of the person who took her money has not been established. Under the decision in the Schaefer case, which we feel obliged to follow, plaintiff was not obligated to prove any specific act of negligence on the part of defendant, and defendant was not excused from liability by showing the watchfulness exercised by it over its vaults or by showing that it kept its own money without loss in the same vault and in a similar box. We are of the opinion that the judgment was justified by the evidence in the case.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

151 - 26810

ROY J. GOLDENBERG,
Appellee,

vs.

BOSTON STORE OF CHICAGO,
a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

224 I.A. 658

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

Plaintiff's statement of claim filed in the Municipal court alleged, in substance, his employment by the defendant in consideration of wages of $2 a week and certain commissions on sales to be paid to him; his payment to defendant of 25¢ for a key to a locker in defendant's store, in which locker he was directed to keep his overcoat and hat while discharging his duties as an employe of defendant; that he placed his overcoat and hat in said locker and locked the same with the key provided therefor; that defendant neglected to take proper care of the locker and permitted plaintiff's overcoat to be removed therefrom by some person other than plaintiff, so that said overcoat, of the value of $65, was wholly lost to plaintiff. No affidavit of merits was filed by defendant, none being required under the rule of the Municipal court governing such cases. The case was tried before the court without a jury. There was a finding and judgment in favor of plaintiff for $65, a reversal of which is now sought. No brief is filed on behalf of appellee.

Plaintiff testified as to his employment by defendant, the use of the locker mentioned in his statement of claim by him and the loss of the overcoat therefrom December 3, 1920. He stated that the key was given to him in the locker room about three days after his employment began; that he found a slip of paper, which was offered in evidence, in his pay envelope indicating a charge of 25¢ for the locker key, which was deducted

from his wages. The overcoat in question disappeared from the locker December 3, 1926, and plaintiff reported the loss to the man in charge of the lockers. The testimony on behalf of defendant shows the watchfulness which was displayed on its part in taking care of the lockers and the precautions adopted to prevent the removal of clothing therefrom. It is contended on behalf of appellant that it is under no liability to reimburse plaintiff for the overcoat, as no specific acts of negligence are charged by plaintiff and none is shown by the testimony.

The evidence is undisputed that plaintiff placed his overcoat in the locker in conformity with directions given by his employer. The employer required plaintiff to pay for a locker key and had its own employes as custodians of the lockers, so used by plaintiff and other employes. It is undisputed that the coat was removed from the locker by some person other than plaintiff. Under these circumstances it would impose upon plaintiff a practically impossible burden to prove any specific act of negligence by which his overcoat was lost. We do not think that plaintiff was under the necessity of making such proof. Defendant was a bailee for hire and the evidence in its behalf was not sufficient to negative the charge of negligence. The evidence was sufficient to sustain the judgment of the Municipal court.

The judgment of the Municipal court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

163 - 26822

THE PETER SCHOENHOFEN BREWING COMPANY, a corporation, et al.,
Appellees,

vs.

NORTH AMERICAN BREWING COMPANY, a corporation,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

224 I.A. 658

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Superior Court of Cook County, entered February 2, 1921, finding the respondent Rudolph Lederer and the North American Brewing Company guilty of violating an injunction issued by said court June 13, 1917, and imposing a fine of $1,000 upon said Lederer and said North American Brewing Company.

The allegations of the original bill of complaint in this case, filed May 29, 1917, and the provisions of the decree of June 13, 1917, were set forth in our opinion filed February 14, 1922, in case number 26510, entitled The Peter Schoenhoefen Brewing Co. v. North American Brewing Co., and need not be repeated at this time. The contentions of appellant in the present case are the same as those involved in the prior case and no additional questions of law or fact are involved herein requiring further attention from this court. The opinion in case number 26510 above noted controls our decision in this case.

The order of the Superior Court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

181 - 26841

JOHN C. TWETMEYER,
Appellee,

vs.

THE CHESTER H. MATTHEWS MARBLE COMPANY, a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

224 I.A. 658

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

Suit was brought by appellee in the Municipal court of Chicago to recover $192, being the balance alleged to be due him for labor and materials furnished in installing certain electric equipment in defendant's manufacturing plant. Plaintiff's statement of claim alleged an agreement to furnish the materials and do this work for the sum of $492, its performance by plaintiff and payment by defendant of $300 on account and an account stated between the parties. No affidavit of merits was filed by defendant. The case was heard by the court without a jury. There was a finding and judgment in favor of plaintiff. Reversal is asked upon the ground that the judgment is contrary to the manifest weight of the evidence.

Briefly stated, the evidence shows that plaintiff agreed to furnish the materials and do the work mentioned in the statement of claim for the price alleged and that the balance remaining unpaid is $192. Plaintiff installed the electric equipment, which was accepted and used by defendant for two years, at the end of which period, defendant asserts, it was obliged to remove the articles installed on account of defects in the materials used and in the workmanship of plaintiff. Defendant complains that fuses blew out, that the service box was an old one and that the wiring was defective and done in an unworkmanlike manner.

The evidence does not show that plaintiff ever refused

to make necessary repairs or alterations in the work or that defendant objected to the service box at the time it was installed. It was sufficient in size for the purposes intended. The mere blowing out of fuses does not necessarily indicate defective workmanship. This result always follows whenever a heavy charge is suddenly put on the wires. We think that the evidence shows a substantial compliance by plaintiff with the terms of his agreement. This is all that is required in such cases. Keeler v. Herr, 157 Ill. 57; Shepard v. Mills, 173 id. 225. Plaintiff can not be charged with expenses resulting from the improper use of the equipment by defendant's employes.

The judgment was not contrary to the manifest weight of the evidence and therefore must be affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

200 - 26890

ELIZABETH SHEA,
Appellee,

vs.

PETER F. DUKET,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

224 I.A. 658

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

Appellee brought an action of forcible entry and detainer in the Municipal court of Chicago to recover possession from appellant of the first flat in the building at number 6315 Glenwood avenue, Chicago. There was a finding and judgment in favor of appellee, which we are now asked to reverse upon the ground that the judgment is contrary to the law and the evidence.

It is shown by the evidence that appellant leased the flat in question from a former owner of the building for a term of fifteen months, expiring September 30, 1921, at a rental of $30 a month. Subsequently appellee purchased the premises. She was the assignee of the lessor's interest in said lease. The lease was in writing and contained a provision that the demised premises were "to be occupied solely as a private dwelling and not otherwise." Appellee contends that appellant violated this covenant by installing in the flat a considerable quantity of hospital and surgical apparatus; hanging a sign in the window advertising himself as a physician; distributing business cards calling attention to the location of his office on the demised premises, and by having patients call there for treatment. These facts were proved on the trial. While defendant denies any violation of the covenant in question, his own testimony discloses a fixed intention of maintaining an office upon the premises for his professional purposes. The record does not show that the judgment was contrary to the manifest weight

of the evidence.

The certificate attached to the bill of exceptions inserted in the transcript of record does not show that the document contains all the evidence given on the hearing of the case. It also appears that the bill of exceptions was filed January 4, 1921, nunc pro tunc as of December 31, 1920. The certificate attached thereto purports to have been signed December 31, 1921, by a judge of the Municipal court who did not preside at the trial, no evidence being furnished as to his authority to do this act. The order allowing the appeal required that the bill of exceptions be filed on or before January 3, 1921, and no extension of time is shown. The original bill of exceptions has been embodied in the transcript of record without a stipulation for its use in lieu of a copy.

For these reasons the bill of exceptions will be stricken from the transcript of record and the judgment affirmed, no error appearing in the common law record.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

of the writers.

The participants discussed in the text of Aristotle Ethics in the examples of Homeric Iliad that the Iliad is the most popular epic in the Greek language of the world. It also mentions that the writings of Aristotle Ethics in 1801, which was first published in the 19th century. The Aristotle's ideas having literary parallels in Homer Iliad, with, by a study of the Homeric epic and his ideas greatly of the Iliad, as evidence being Translated as to the universality of the Iliad. The Greek philosophy the central principle that the idea of morality is the Iliad is of Bishop Thomas, 1801, and is mentioned at time in Aristotle. The Religious Will of Aristotle has been discussed in the Aristotle of Homeric writers is criticized for the fact in the of a moral.

The Greek Epic of Iliad of Homeric will be Aristotle Ethics the Homeric is proved and the Christian religious, as every moralist in the modern Ideas.

ATTENTION.

Aristotle, T. J. and Homer, J., Jerome.

218 - 26878

JOHN M. TRAEGER, for Use of LOUIS COHEN, Doing Business as CHICAGO RAG COMPANY, Appellee, vs. MARIE F. JOHNSON, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

224 I.A. 658

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal court of Chicago in favor of appellee for $1987, which was in conformity with the jury's verdict. The action is based upon a replevin bond signed by one Sam Horowitz, who was the plaintiff in the replevin suit, as principal, and the appellant, as surety. On February 28, 1919, the plaintiff in the replevin suit in the Superior court of Cook County was non-suited on his own motion. A writ of *retorno habendo* was ordered and issued against Horowitz, who refused to return the goods replevied. The writ was returned unsatisfied and thereupon suit was brought upon the replevin bond. Suit was originally brought against Horowitz and the appellant, but was dismissed as to Horowitz prior to the judgment.

It is contended by appellant that the judgment cannot stand because the liability of the persons signing the replevin bond as principal and surety was joint and not several, and that consequently the judgment must be against all or none, in the absence of any special defense. The record shows that the replevin bond was the joint and several obligation of the parties signing the same. Consequently a suit may be maintained against either or all of the obligors. *Kasper* v. *The People*, 230 Ill. 342; *Maston*

v. Ross, 185 Ill. App. 57. Plaintiff had a right to discontinue the suit as to one of the defendants at any time before judgment. Kasper v. The People, supra; Metz v. Wood, 30 Ill. App. 131.

No defense to the action on the replevin bond being shown, the judgment of the Municipal court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

218 - 26878

JOHN E. TRANGER, for the use of LOUIS COHEN, doing business as CHICAGO BAG COMPANY, Appellee,	Appeal from Municipal Court of Chicago.
vs.	
MARIE F. JOHNSON, Appellant.	ON PETITION FOR REHEARING.

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

A petition for rehearing has been presented in this case upon the ground that our opinion overlooks and disregards certain matters upon which the plaintiff in the original replevin suit might have relied and which it is alleged constitute a defense in this action, which is a suit upon the replevin bond.

It is urged that Horowitz, the plaintiff in the original replevin suit, was the purchaser from Cohen, the defendant therein, of the merchandise in question and therefore entitled to the possession thereof. This contention is based upon a conversation between the parties in which the proposed purchase of the merchandise by Horowitz was discussed, in the course of which, after the price of the goods had been stated by the seller, Horowitz declared with reference to the goods, "All right. They are mine." It is claimed that by virtue of these words there was an acceptance of the merchandise by the buyer, who thereupon became entitled to their immediate possession under certain provisions of the Uniform Sales Act.

We did not discuss the testimony upon this subject, which was offered and refused by the court, or the ruling of the trial court thereon, because it seems obvious that under paragraph 1 of section 4 of the Uniform Sales Act there was no sale of the merchandise. There was no note or memorandum in writing of the

transaction. It was therefore necessary for the purchaser to accept part of the goods "and actually receive the same," or to give something in earnest to bind the contract or in part payment. These requirements of the statute were not fulfilled.

As stated in our former opinion, no defense to the action was shown by the record in this case, and we think that there was no reversible error in the rulings of the trial court upon questions of evidence.

The petition for rehearing is denied.

DENIED.

Gridley, P. J., and Barnes, J., concur.

STANDARDIZED. It was therefore necessary for the prosecution in always just at the point that mutually crossing the road, to be give evidence in order to take the opinion of an jury judgment. These requirements of the statute were not satisfied.

As stated in our former opinion, the instant in question was shown by the evidence in this case, but it still that there was no reasonable error in the refusal of the trial court were questions of evidence.

The judgment for reversing is denied.

DENIED.

FRIEDMAN, P. J., and SHERMAN, J., concur.

243 - 26903

WILLIAM H. LANGE,
Appellee,

vs.

T. H. FLOOD & COMPANY,
a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

224 I.A. 659

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for $1960 rendered in an action of assumpsit by the Municipal court of Chicago in favor of appellee, who was plaintiff in that court, and against appellant, who was defendant. Plaintiff's statement of claim alleged that his claim is for $1991.50 due him for the composition, makeup, printing and folding of one thousand law books entitled, "Joslyn's Criminal Law;" also for the composition, makeup, printing and folding of one hundred fifty price lists of four pages each; that said books and price lists had been delivered to and accepted by defendant. It further alleged, in substance, that plaintiff is now "the actual bona fide owner of certain claims and accounts for the total of $1991.50, sued upon herein, by assignment from Ross & Company, printers, on April 15, 1920, for value received." Defendant's affidavit of merits alleged that plaintiff contracted with defendant for the composition, makeup, printing and folding of the books mentioned at an agreed price of $1357, and that plaintiff agreed to perform the work in a good and workmanlike manner; that plaintiff turned over to defendant's agent for binding one thousand printed sheets of said book, of which approximately twenty-five per cent. were defectively printed and entirely worthless; that the indices of all of said books were improperly and defectively printed and that said books as delivered to defendant were wholly worthless; that defendant refused to accept the same until said

defects were corrected by plaintiff; that plaintiff admitted that the work was defective as above mentioned and promised to correct said defects but failed and refused so to do. Defendant does not deny the allegation in the statement of claim to the effect that plaintiff is the owner of certain claims and accounts amounting to $1991.50,as above quoted. The case was heard by the court without a jury. The trial resulted in a finding and judgment in favor of plaintiff, from which this appeal has been prosecuted.

Appellant contends that plaintiff's statement of claim fails to state a cause of action and is insufficient to sustain the judgment. This contention is based upon the allegation as to plaintiff's ownership of certain notes and accounts by assignment from Ross & Company, the inference being that the action is based upon a contract with Ross & Company, while the first part of the statement of claim indicates, and the proof shows, that the contractual relations involved herein were between plaintiff personally and defendant. No explanation is given as to the purpose and relevancy of the claim to the ownership of certain accounts by assignment from Ross & Company, but the statement of claim, excluding this allegation, states a cause of action sufficient to sustain the judgment, although somewhat lacking in specific averments. The defects, if any, in the statement of claim should have been urged in the Municipal court before filing the affidavit of merits. Upon the trial the statement of claim was regarded by both parties as sufficient to advise defendant as to the nature of plaintiff's claim. No objections having been made to it in the court below, all intendments and presumptions are in its favor when the question is first raised on appeal. Sargent v. Rumblis, 215 Ill. 428; Humason v. M. C. R. R. Co., 259 id. 462; O'Rourke v. Sproul, 147 Ill. App., 609. The allegation in question was not denied by defendant's affidavit of merits and therefore was admitted. Smith v. Bellrose,

200 Ill. App. 368.

The evidence shows that by an agreement made in the early part of 1920 plaintiff, who was a printer, contracted with defendant, who was a publisher of law books, to furnish the paper, do the typesetting, printing and folding of the printed sheets of the book mentioned, which the defendant proposed to publish. Plaintiff was informed on behalf of defendant that the book would be sold at a high price and that the work must be well done. Plaintiff assured defendant that he could and would do a first class job satisfactory to defendant in every respect. Plaintiff was then given the contract. The printing was done on sheets, each containing thirty-two pages of the book. Plaintiff did the typesetting and delivered the forms to one Peterson, who did the printing. Thereafter Peterson delivered the printed sheets to another firm, which did the folding. All of this work was included in plaintiff's undertaking. After the printed sheets had been folded they were placed in packages, each containing about twenty books, and sent to defendant in April, 1920. Defendant then sent them to a bindery for binding. At the bindery the folded sheets are sewed into separate books and then bound, the sheets remaining uncut until after the binding has been completed and delivery made. About two hundred fifty volumes were bound, wrapped separately and delivered to defendant with the leaves uncut. The remainder of the order was delivered to defendant with the sheets sewed together but remaining unbound and uncut. Defendant shipped about two hundred thirty-six of these bound volumes, one hundred ninety-nine of which were sold and the balance sent to its customers on approval.

The evidence further shows that after the proof has been corrected by the author there is no further opportunity for inspection of the work by either author or publisher until the folded sheets have been bound and thereafter the pages have been

Sun 11:0, 1920, 1881.

The evidence shows that by an agreement made by the early part of 1920 plaintiff, who was a printer, associated with defendant, who was a publisher of law books, to furnish the capital, by the typewriting, printing and filling of the printed forms of the book mentioned, which the defendant expected to publish.

Plaintiff was informed on behalf of defendant, that the book would be made up a high price and that the price would be well fair. Plaintiff asserted defendant stand by it and would do a fine job. Defendant satisfied by defendant in every respect. Plaintiff was then given the contract. The printing was done at Atlanta, and commencing the beginning page of the book. Plaintiff did the typewriting and delivered the forms to the defendant, who did the printing. Defendant delivered the printed sheets to another firm, which did the binding. All of this work the defendant to plaintiff's satisfaction. After the printed sheets had been finished they were placed in warehouse, much misplacing about twenty boxes, and said to defendant in Atlanta, Ga. Defendant then sent them in a binnery car elsewhere. As the company was trying to raise the money with expenses bonds and then bonds, the binnery refusing said until after the binding the bonds expiration and delivery only. Upon the contract (Ex. volume one) bond, secured accordingly and delivered to defendant with the lawsuit above. The evidence of the price was delivered to defendant after the contract which plaintiff has remaining unpaid and owed. Defendant argued that the contract bond at three bonds printed, for further investigation of which were sent and the volume sent to the contract to interest.

The evidence further shows that after the price had been accepted by the author there is no further arrangement for investigation of the work by author which by statutory until the defendant charged some from first and therefore the charge here there

out. All inspection as the work progresses is done by the printer as the printed sheets come from the press or by the person folding them. It is customary for both the printer and the folder to inspect these sheets and throw out those which are defective, for the reason that any further inspection is impracticable after the sheets have been sewed together. The exact date of the delivery of the books to defendant is not shown. The president of the defendant company stated that in June or July, 1920, he discovered that some of the books were so defectively printed as to be unreadable; that a part of them which had been shipped to customers were returned on account of these defects; that he showed plaintiff several of the books, calling plaintiff's attention particularly to the defective printing, and stated that if the remainder of the books were printed in the same manner the books were unsalable. Plaintiff then requested that the remainder of the books be examined and that, after such examination had been made, there could be a further discussion of the matter. Plaintiff denied having this conversation. Thereafter the president of defendant company stated that he commenced an examination of the unbound books to discover how many were defectively printed; that this examination was a slow and tedious work, as the pages had to be cut, requiring from twenty to thirty minutes for the examination of each volume. The examination had not been completed at the time the suit was brought. One of the books was offered in evidence and a reference made to eighteen specified pages which were so defectively printed as to make the books unsalable. Defendant offered to prove that approximately seventy-five per cent. of the books contained similar defects. Peterson, the printer of the books, who was called as a witness for plaintiff, testified that if seventy-five per cent. of the books contained defects similar to those shown as above indicated, the job was not done in a good and workmanlike manner. The particular

defects, of which complaint is made, are that certain pages in each volume were out of register, meaning that the lines on one page were not in line with the corresponding printed lines on the opposite page of the same sheet, and that numerous pages in every volume were so printed that the printing on one side showed through the other side of the sheet, blurring the page and thereby rendering it difficult to read. Defendant offered to show that these defects existed in approximately seventy-five per cent. of the books delivered to it by plaintiff, and further offered to show that the books printed in that manner were unsalable; that the defects in the several volumes were discovered about the latter part of June, 1920, and plaintiff's attention called thereto. These defects were discovered subsequent to the alleged conversation between the plaintiff and witness. The court excluded the testimony offered, apparently upon the theory that the books had not been rejected by the defendant. There is no evidence that they had been accepted.

The evidence which was offered and excluded by the court was material to the determination of the issues involved in the case. Defendant was under no obligations to pay for books which had been so defectively printed as to render them unsalable. There was an express as well as an implied warranty that the printing should be done in a workmanlike manner and the defendant should have been allowed to show the number of volumes, if any, that were actually unsalable. If the contention of appellant is correct as to the defects in the printing of the books, it undoubtedly sustained a loss, which it had a right to show in mitigation of damages.

The judgment of the Municipal court is reversed and the cause remanded.

REVERSED AND REMANDED.

Gridley, P. J., concurs.
Mr. Justice Barnes took no part in the decision of this case.

287 - 26918

JOSEPH E. HESSER and HAROLD F. SGDEN,
Appellees,

vs.

J. P. CHAMBERLIN,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

224 I.A. 659

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

Appellees brought an action of forcible entry and detainer in the Municipal court of Chicago against appellant to recover possession of a certain flat on the first floor of the building known as number 6310 Lakewood avenue, in Chicago. After a trial before the court without a jury, judgment was entered in favor of appellees. Appellant seeks a reversal upon the ground that his lease of the demised premises was not terminated in accordance with its provisions, and for the further reason that the record does not show the existence of the relationship of landlord and tenant between the parties and does not show that appellant was in possession of said premises at the time suit was begun.

The lease in question was for a term commencing October 1, 1918, and ending September 30, 1920, and provided that it might be terminated by the lessee upon giving to the lessor sixty days written notice of the lessee's intention to terminate the lease; otherwise it was to continue from year to year until terminated by like notice in some ensuing year, and further provided that the lessor was entitled to terminate the lease upon like notice to the lessee by mailing the notice to the lessee addressed to him at the demised premises. In accordance with this provision the lessor gave to the lessee more than sixty days prior to September 30, 1920, a notice stating in substance that the lease would be terminated

September 30, 1930, and advising the lessee that the notice was given pursuant to the above mentioned provision of the lease. Appellant contends that this notice was not sufficient for the purposes intended and that the notice in order to be effective should comply in all respects with certain statutory notices and should contain a specific demand for possession. We do not regard the authorities cited by appellant as applicable to the case at bar for the reason that they relate to conditions and circumstances totally different from those herein involved. For that reason we do not deem it necessary to review in detail the cases cited. The notice given by appellees in this case was sufficient to advise appellant of the intention of appellees to terminate the lease on September 30, 1930, which was the date provided for its expiration. It was unequivocal in its language and the tenant could act upon it with certainty.

The record shows that the relationship of landlord and tenant existed between the parties as a result of the lessor's assignment of his interest in the lease to appellees. That defendant was in possession of the premises is shown by the testimony of the real estate agent, who testified explicitly to that effect.

The judgment of the Municipal court is fully sustained by the evidence and is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

September 30, 1938, and indicating the hope that the policy was given approval in the above mentioned provision of the Treaty. Artificial breeding that which using the sub-nutritional for the purposes the Vienna and that was unlike is open to attempting should amply in all grounds with material voluntary relative and without indeed a minimum Second Ser-economics. To is not repeat the unfamiliar sided by questions as available to the come is for its treaty that they refuse to conditions and disarmament locally different from Czech Slovak Lastovo. For that reason to it not does it necessary to review in detail the same other. The notion date by supplies in this case for relinquished in point equipment of the Salzburg at provides to Czechoslovakia the Prague in Sudeten 30, which was the date provided for its evaluation. It was more equipped in the Sudeten and the Czech could not open it more fully.

The remark about that the relationship of Germany and Czech related between the existing as a result of the Czech's abandonment of its interest in the Sudeten by equipment. The determine was to prevented at the province is close by the closing of its real nature again, and limited negotiate in the other.

The judgment of the Czechoslovakia could it fully realized by the attempts and is affairs.

Respectfully,

Hubert, J. L. von Sachsen, Jr. Friedrich.

281 - 26951

A. W. TAFT,
Appellee,

vs.

WILLIAM H. ROCKWOOD,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

224 I.A. 659

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

Plaintiff in the court below, who is appellee here, brought suit in the Municipal Court of Chicago September 9, 1920, to recover from appellant the amount alleged to be due upon two promissory notes. After a trial without a jury the court found in favor of plaintiff and entered judgment against defendant, who is appellant here, for $3,022.56 and costs of suit. The facts are undisputed and appellant seeks a reversal upon the ground that the judgment is contrary to the law applicable to the case.

The notes upon which the action is based were signed by Taft & Rockwood, which was a co-partnership formerly existing between the parties to this suit, dissolved by agreement between them June 30, 1912. One of the notes is for $974.06, dated January 1, 1909, payable five years after date, and the other is for $907.84, dated January 1, 1911, payable on or before three years after date. Both bore interest at six per cent per annum and are payable to the order of appellee. No payments were made on the notes and the judgment was for the amount of principal and interest thereon. The agreement between the parties dissolving the partnership is dated June 13, 1912, and by its terms became effective June 30, 1912. It recited the existence of a partnership in the insurance business under the firm name and style of Taft & Rockwood and that the parties thereto had full knowledge of the books, accounts and affairs

of the partnership and that the contract was made with the full approval of the books and accounts of the partnership, and no accounting of the funds or business of the partnership was to be had. It provided that Rockwood be given the exclusive right to continue to use the firm name in the insurance business in the State of Illinois and adjoining states for eight years, also the exclusive right to use in such business the name of Taft in connection with his own name and that of others, if he so desired. It further provided that Taft thereby sold, assigned, transferred and conveyed to Rockwood all of the former's right, title and interest in and to all of the property of the partnership at the close of business on June 30, 1912, and that Rockwood thereby assumed and agreed to pay all debts of every kind and nature owing by the partnership at the close of business on that date. Rockwood agreed to pay to Taft for the latter's interest in the firm business the sum of $30,000, without interest, in the following manner, to-wit: $1,000 on or before July 1, 1912; $1,000 on or before October 1, 1912; $1,600 on or before December 25, 1912; and $275 per month on the first day of each and every month, beginning July 1, 1912, for eight full years, the last of said monthly payments to be due and payable June 1, 1920.

The evidence shows that at the time of making the dissolution agreement and for a considerable period thereto, Taft was in an infirm state of health. The agreement apparently recognizes this fact by the provision that in the event of Taft's death between the date of the agreement and June 30, 1917, the total amount due and payable thereunder should be $15,500, and that any and all payments made by Rockwood up to the date of Taft's death should be credited on said sum, and by the further provision that in the event of Taft's death after June 30, 1917, and prior to June 30, 1920, the obligation of Rockwood to make additional payments of $275 per month as therein provided should cease and

of the partnership and that the contract was made with the full approval of the terms and responsibilities of the partnership, and no commitment of the funds or business of the partnership was to be had. It provided that Redwood be given the exclusive right to continue to use the film name in the Dominion Territories in the state of Illinois and adjoining states for eight years, also the exclusive right to use in such territories the name of Duff by manufacturing this film and use that of others. It be be noticed, it further provided that Duff thereby sell, assigned, transferred and conveyed to Redwood all of the Inventor's right, title and interests in and to all of the property of the partnership on the close of business on June 30, 1933, and also Redwood thereby assumed and agreed to pay all debts of every kind and nature owing by the partnership at the close of business on that date. Moreover, agreed to pay to Duff for the Inventor's interest in the film business the sum of $30,000, without interest, in the following manner, namely: $3,000 on or before July 1, 1933; $3,000 on or before October 1, 1933; $3,000 on or before January 1, 1934; $3,000 on or before November 30, 1934; and fifty per month on the first day of each and every month, beginning July 1, 1935, for eight full years, the last of such monthly payments to be due and payable June 1, 1943.

The evidence shows that at the time of making the distribution agreement and for a considerable period thereafter, Duff was in an active state of health. The appellant contendes that the parties knew that in the month of July's decline between the date of the agreement and June 30, 1933, the total amount due and payable thereunder should be $13,000, and that they had all expected such to be liquidated up to the date of Duff's death should he survive on such sum, and by the further provision that in the event of Duff's death after June 30, 1933, and prior to June 30, 1935, the obligation of Redwood to make additional

determine and no additional sums should be due or owing by said Rockwood under the agreement.

Appellee contends that the notes in question were partnership debts which Rockwood expressly assumed and agreed to pay by the dissolution agreement of June 13, 1930, and that he is entitled to receive payment of the same. Appellant denies any indebtedness to appellee by virtue of the notes or otherwise. His affidavit of merits states that the two notes evidenced amounts due at their respective dates to the plaintiff in the adjustment between the partners arising out of overdrafts by Rockwood, as shown on the books of the firm and that the notes did not evidence any liability of the firm to any third party as a creditor thereof, nor any liability of the firm which was assumed by defendant under the dissolution agreement.

Mr. Rockwood was the only witness who testified upon the trial of the case. His testimony tended to prove his theory of the case as above stated. It was shown by the books of the firm that the notes in question were unmentioned therein and that there was no record of them as partnership liabilities. It was also shown that no mention of the notes was made by either of the parties in the course of the negotiations which resulted in the dissolution agreement and that their existence was not called to Rockwood's attention until after he had completed all payments to be made to Taft under the agreement, the last of which became due and payable in June, 1930, about six months before suit was commenced.

It has been held repeatedly that where, upon the dissolution of a copartnership, one partner sells to the other all his interest in the firm assets for an agreed consideration, the law presumes that all indebtedness of the retiring partner to the firm and all indebtedness of the firm to the retiring

[illegible]

[illegible]

[illegible]

partner are taken into consideration in fixing the amount to be paid upon the sale and that all such indebtedness is deemed to be cancelled. Taylor v. Coffing, 93 Ill. 207; Hamilton v. Wells, 182 Ill. 144; Milley v. Hoyt, 123 Ill. App. 568; Commons v. Snow, 194 id. 569. In Hamilton v. Wells, supra, in commenting upon a similar situation, the court said:

> "When a partner makes a sale of his interest in the firm property, the presumption is that he sells only his legal interest and in the absence of any contract or agreement to that effect it cannot be assumed that such partner was selling, had sold or intended to sell his own indebtedness to the firm, if any existed. This results from the presumption that arises that in the valuation upon which the sale is based, the debt of the selling partner is taken into account and the value of his interest is thereby reduced to that extent as soon as the debt is paid."

This language is directly applicable to the situation involved in the case at bar. After a partnership has been dissolved it will be presumed that there was an adjustment of the accounts and that all accounts were taken into consideration in arriving at the amount to be paid the retiring partner, and that the debt of the selling partner was taken into account in fixing the sale price. Commons v. Snow, supra. The same rule must necessarily apply to the debt, if any, of the purchasing partner. A partner having access to the books of his firm is presumed to know the state of the account of each partner. Mattenauer v. Adamick, 70 Ill. App. 602.

These propositions are not disputed by the brief of counsel for appellee, but it is insisted that the notes in question, although signed by Taft and Rockwood, were really Rockwood's notes and evidenced a personal indebtedness from Rockwood to Taft. This position is not only contradictory to plaintiff's theory of his case as outlined in his statement of claim, but is not supported by the facts. It is undisputed that the notes were given to equalize the interests of the respective partners in the firm assets. The partners could have been placed

partner are taken into consideration in fixing the amount to be paid upon the wife and that all such considerations is improper in the annulment. Tucker v. Tucker, 32 III. 367; Hamilton v. Jones, 3 Ill. 141; Bishop v. Cook, 3 Ill 121, 122; Hamilton v. Jones, 3 Ill. 140. In Hamilton v. Jones, supra, in upholding a property settlement made in anticipation of a divorce, the court said:

> "Does a partner owing a duty of fair behavior to the life partner, who proceeding in a suit to avoid only his legal liability can in the absence of any evidence or agreement to that effect, be deemed to abandon this and perform his duties, and will he believed to sell his own interests in the firm, at any valuation. This would result from the proceeding that orders that in the relations upon which the suit is based, the duty of the erring partner is to turn into account and the value of his interest in the property to that account as gain to the wife in part."

This language is directly applicable to the situation involved in the case at bar. Never a partnership has been dissolved in all be presumed that there was no adjustment of the accounts and that all elements were taken into consideration in arriving at the amount to be paid the retiring partner, and that the wife of the retiring partner was taken into account in fixing the value of the retiring partner's interest in fixing the value of the partnership. Hamilton v. Jones, supra. The same rule must necessarily apply in the case, if any, of the partnership property. A property settlement agreed to the wife of the firm is presumed to take the place of the property of such partner. Hamilton v. Jones, 3 Ill. 141, 142, 144.

These propositions are not disturbed by the point of counsel for appellee, but it is insisted that the order in question, although signed by Ewing and Dunham, with reality Dunham's name was signed a purchase transaction from Dunham to Ewing. This position is not only unsupported by plaintiff's testimony at the time he filed in the statement of claim, but is not supported by the record. It is contended that the order was given in satisfaction the indebtedness of the partnership

upon an equal basis on the date of the first note either by Rockwood's payment to the firm of the amount of the note or by the payment of the same amount by the firm to Taft. Either of these methods could have been pursued with the same results on the date of the second note. The record does not show that Rockwood was ever personally indebted to Taft for the amount of the notes.

It was undoubtedly the intention of the parties that the fulfillment of the terms of the dissolution agreement should effect a complete settlement of all matters between them arising from their partnership relations. This intention is to be ascertained not only from the language of the instrument itself, but by a reference to the circumstances surrounding the parties and the objects which they had in view. In an early case the Supreme Court of this state said, in substance, that courts are taught by their experiences in human affairs that the intention of the parties to an agreement must not be sought merely in the apparent meaning of the language used, but this language must be enlarged or limited by reference to the circumstances surrounding the parties and the objects they evidently had in view. Robinson v. Stowe, 39 Ill. 568. In construing a contract it is the duty of the court to discover and give effect to the intention of the parties so that performance of the contract may be enforced according to the sense in which it was made. In the interpretation of a written contract the court, in order to determine its meaning, will consider all the facts and circumstances attending its execution. Fritzsh v. Fritikin, 173 Ill. App. 645; Calkins v. Pease, 125 id. 270. Plaintiff received $30,000 in cash as a consideration for the transfer of all of his interest in the assets of the copartnership. This consideration was a sum agreed upon by the parties in lieu of a detailed accounting of the partnership business and the property. In assigning all of his interest in the partnership assets plaintiff released all interest

which he might have had otherwise, arising out of the two notes.

The judgment of the Municipal Court is reversed with a finding of facts.

REVERSED WITH FINDING OF FACTS.

Gridley, P. J., and Barnes, J., concur.

281 - 26951

FINDING OF FACTS.

The court finds as ultimate facts in the case that the notes involved in this suit do not evidence a debt of the firm of Taft & Rockwood, and that there was no consideration for said notes.

27536

EMMA C. RECTOR,
Complainant and Appellee,

vs.

EDWARD WEISS et al.,
Defendants.
On Appeal of LAKE STATE BANK,
a Corporation,
Appellant.

INTERLOCUTORY APPEAL FROM
CIRCUIT COURT OF COOK COUNTY.

224 I.A. 659

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the Lake State Bank from an interlocutory order entered December 5, 1921, by the Circuit court of Cook County granting a preliminary injunction against appellant without notice to it. The original bill of complaint was filed March 3, 1921, and is in the nature of a creditor's bill seeking a discovery of property to satisfy a judgment in favor of complainant and against the defendant Weiss. The bill alleged, among other things, that Weiss had a secret interest in a corporation known as the Washington Coffee Shop; that he was the actual owner of certain real estate in Cook County, the record title to which stands in the name of another person, and particularly, that on July 30, 1920, Weiss opened a checking account with appellant and deposited the sum of $1096.01; that other large deposits were made and that on November 23, 1920, when the checking account was closed the balance due Weiss was $2733.97. The above is the only mention of appellant contained in the bill. Appellant was not made a party defendant and there was no prayer for an injunction of any kind against appellant.

On December 5, 1921, without notice to any of the solicitors of record or to appellant, an order was entered by the court granting leave to complainant to file a proposed amendment to the bill of complaint making appellant and Security Trust &

Deposit Company parties defendant. The order further directed that "a temporary writ of injunction issue against the Lake State Bank and the Security Trust & Deposit Company enjoining them from paying out any moneys or deposits which Edward Weiss may have delivered to them or which Edward Weiss or any other person may have deposited or left with the Lake State Bank or the Security Trust & Deposit Company which may be in possession of the said Lake State Bank or Security Trust & Deposit Company, in which Edward Weiss is legally or equitably interested."

The proposed amendment to the bill making appellant a party defendant thereto was filed December 7, 1921. The amendment contains no prayer for an injunction. An appeal from the above mentioned order of December 5, 1921, was taken and an appeal bond filed January 5, 1922. The order granting the injunction recites "that it appears from the said bill and affidavit that complainant's rights will be unduly prejudiced if injunction is not issued immediately and without notice." The affidavit mentioned by the court in this order apparently refers to the affidavit accompanying the original bill of complaint, or it may refer to a certain affidavit filed by one of the solicitors for complainant on December 8, 1921, in connection with his motions for leave to amend the bill and for a temporary injunction. Neither of these affidavits contained any allegations justifying the conclusion as to undue prejudice mentioned in the court's order.

It is obvious from the foregoing statement that the case at bar falls within the logic and reasoning of many cases in which an order of the character here involved, granted without notice, has been reversed. The statute (R. S., chap. 69, sec. 3), provides that no injunction shall be granted without previous notice of the time and place of the application unless it shall appear from the bill or

affidavit accompanying the same that the rights of the complainant will be unduly prejudiced if the injunction is not issued immediately and without such notice. There can be no presumption in favor of such action without notice. The applicant must, by a proper showing of facts duly verified, bring himself within the exception mentioned in the staiute before he is entitled to an injunction without notice. Brin v. Craig, 135 Ill. App. 301; Grabarski v. Stankowicz, 179 id. 45. Such allegations as are contained in the documents mentioned herein which even remotely tend to show undue prejudice are based upon information and belief and are for that reason insufficient as a basis for a temporary injunction without notice. Grabarski v. Stankowicz, supra; Roman v. Humphreys, 220 Ill. App. 502.

Neither the original bill nor the amendment thereto contained a prayer for an injunction and were materially defective in that respect. They contain nothing indicating an intention to apply for an injunction against appellant. A prayer for an injunction is essential to the valid granting of a preliminary injunction. Primmer v. Patten, 32 Ill. 528; Hill v. Tarbel, 91 Ill. App. 272; American Fine Arts Co. v. Voight, 103 id. 659.

The record shows that these well established rules of chancery pleading and practice were not observed in the case at bar.

The order of the Circuit court granting the injunction is reversed.

REVERSED.

Gridley, P. J., and Barnes, J., concur.

27537

EMMA C. HECTOR,
Complainant and Appellee,

vs.

EDWARD WEISS et al.,
Defendants.
On Appeal of WASHINGTON COFFEE SHOP CO.,
a Corporation,
Appellant.

INTERLOCUTORY APPEAL
FROM CIRCUIT COURT OF
COOK COUNTY.

224 I.A. 660

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

This case was consolidated for hearing with the preceding case, No. 27536, which was an appeal on behalf of the Lake State Bank from the same interlocutory order granting a preliminary injunction that is involved in the case at bar, the only difference in the two cases being that the present appeal is prosecuted by the Washington Coffee Shop Company, a corporation, which was one of the defendants in the original bill, and the other was prosecuted by the Lake State Bank, which was not a defendant in the original bill.

The allegations of the original bill of complaint and the subsequent pleadings in the case and the interlocutory order entered by the Circuit court of Cook County December 5, 1921, granting the preliminary injunction, from which both appeals were taken, are set forth in our opinion this day filed in this case upon the appeal of Lake State Bank, number 27536, and need not be repeated herein.

The contentions of the appellant in the present appeal are the same as those involved in the prior case. No additional questions of law or fact are involved herein requiring further attention from this court. The reasons for our decision indicated in our prior opinion control our decision in the present appeal.

The order of the Circuit court granting the injunction herein is reversed.

REVERSED.

Gridley, P. J., and Barnes, J., concur.

17 - 26767

224 I.A. 660

THE PEOPLE OF THE STATE OF ILLINOIS ex rel. ALICE CLEMENT PICTURES COMPANY, a Corporation, et al.,
Defendants in Error,

vs.

CITY OF CHICAGO and CHARLES C. FITZMORRIS, Superintendent and Chief of Police,
Plaintiffs in Error.

ERROR TO CIRCUIT COURT OF COOK COUNTY.

224 I.A. 6

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is a petition for mandamus to compel the Chief of Police of the City of Chicago to issue a permit to the Alice Clement Pictures Company to exhibit a certain moving picture in Chicago, which permit had been refused.

The defendants filed a general demurrer, which was overruled by the court, and electing to stand by the demurrer judgment was rendered awarding the writ of mandamus. Defendants are seeking a reversal.

Mandamus should only issue to command the party to whom it is addressed to perform some specific duty which the relator is entitled of right to have performed; and while such a party may be compelled to act in the performance of his duty, "he cannot be controlled in his judgment or compelled to exercise his discretion in a particular manner by means of this writ." The primary object of mandamus "is to stir up the inactive or neglectful officer to the discharge of his duty." People v. Cobb, 186 Ill. 364.

This court has heretofore had occasion to consider the question concerning permits to exhibit moving pictures. People ex rel Guggenheim v. City, 209 Ill. App. 582; and in the same volume are a number of like cases, at pages 586, 588, 591, 595 and 596. As was said in the first of these, "the function of censorship is quasi judicial in character, calling for the exercise of sound discretion

with which the courts will not ordinarily interfere except in a clear case" of abuse.

We consider this petition with these principles in mind. The petition alleges that the refusal of the Superintendent of Police to grant the permit was wilful, arbitrary, capricious and prejudicial to relator. These are mere conclusions of the pleader and are not admitted as facts by the demurrer. No allegations of fact to support these conclusions are presented.

The petition alleges that one Alice Clement is a police woman with great experience with young girls who have been inveigled into immoral places, and that it is the intention of the relator to use this experience as the basis for a picture. The name of the picture is "Dregs of the City." It purports to show the experience of a young country girl meeting a stranger by flirtation, who by false promises persuaded her to leave her home to come with him to a large city where she is compelled to go to cabarets and resorts of low repute; that Alice Clement, seeking her, visits cabarets, opium joints, and other places of the underworld. One of these places is raided and one of the girls taken informs the officer as to where the innocent country girl may be found, and the officer thereafter finds her just in time to save her from brutal treatment at the hands of the man who lured her from home. It is at once obvious from the character of the proposed picture as thus described, that it would be a question for the exercise of discretion and judgment as to whether it should be permitted to be publicly exhibited. It seems to be a picture which under the tenuous claim of having a moral purpose, is in fact devised to make money through the appeal to prurient curiosity.

We find no abuse of the discretion vested in the chief of police in his refusal to grant a permit to exhibit this picture. Rather the record shows that the discretion was wisely exercised.

The judgment of the Circuit court is reversed and the cause is remanded with directions to sustain the demurrer to the petition.

REVERSED AND REMANDED
WITH DIRECTIONS.

Dever, P. J., and Hatchett, J., concur.

240 - 26900

UNITED STATES FIDELITY AND GUARANTY COMPANY, a Corporation, Appellee, vs. WILLIAM M. LE MOYNE, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

224 I.A. 660

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover certain expenditures for which, it was claimed, defendant was obligated under the provisions of his application for a surety bond guaranteeing the performance by him of a certain contract, and upon trial by a jury had judgment for $2625.74, from which defendant appeals.

The application or contract of indemnity upon which plaintiff issued its surety bond contained an agreement by the defendant

> "to indemnify, and keep indemnified, the said company from and against any and all loss, costs, charges, suits, damages, counsel fees and expenses of whatever kind or nature which said company shall or may, for any cause, at any time sustain or incur, or be put to for or by reason or in consequence of said company having entered into or executed said bond."

Do the expenses in question come within the scope of this provision? This was a question of fact properly submitted to the jury and the record justifies its conclusion in the affirmative.

The facts substantially are that in 1912 defendant contracted for the purchase of certain property in Chicago, which he wished to change into a warehouse. He also contracted with the Chicago Junction Railway Company for the construction of a switch track to his property, agreeing to furnish the railway company with a surety bond for the faithful performance of his promises in the contract. He thereupon executed an application to the plaintiff company for the issuance of such a bond, which includes the

agreement of indemnity above quoted. The switch track was laid but defendant was unable to make payment as he had agreed and plaintiff was notified of this fact by the railway company and advised that the amount due was $13,070.12. Then followed negotiations and conferences looking to some arrangement whereby the obligation of plaintiff under its surety bond and of the defendant to the railway company would be satisfied and plaintiff also protected. The law firm of Judah, Willard, Wolf & Reichmann represented plaintiff in these negotiations. Witnesses testified to a number of conferences with reference to the situation often lasting several hours. Defendant seems to have been embarrassed financially and unable to meet his obligations. Proposals were submitted to the attorneys for the plaintiff and investigated by them.

Suit was commenced by the Chicago Junction Railway Company against both plaintiff and defendant; subsequently plaintiff paid the railway company the full amount of its claim. The suit, however, proceeded to judgment, which was entered against both the surety company and the defendant, Le Moyne. This judgment was assigned to a Mr. Marshall, who was the resident secretary of plaintiff. Eventually plaintiff was able to reimburse itself for its payment to the railroad company by securing $5,000 out of the purchase money of a piece of property sold by defendant, and the balance by an execution levied on certain shares of stock of a storage warehouse company.

The attorneys for plaintiff rendered a bill for $2500 for their services in this matter, and the evidence shows that plaintiff paid this bill in good faith. Mr. Phillips, a lawyer, and in charge of the claim department of plaintiff, testified that he was personally familiar with the entire transaction from the

time defendant made default in his contract with the railroad company; that he attended many if not most of the conferences in the office of plaintiff's attorneys. His testimony explains in detail the efforts made to secure performance of defendant's obligations. This witness also testified that he kept a record of the matter in a diary and checked up the attorneys' bill as to time consumed; that he was familiar with the rates that lawyers charged as he employed lawyers in various kinds of litigations and that from his familiarty with the usual and customary fees in Chicago, he was of the opinion that the charges were fair and reasonable, and had been in good faith paid to the attorneys upon this belief.

Defendant seems to contend that because he admitted that he had no meritorious defense to the claim of the Chicago Junction Railway Company because of his default under his contract, that there should have been no attorneys' fees incurred by plaintiff. It is sufficient to say that (1) the evidence does not show any item of charges for services in the trial of that case; (2) whether defendant did or did not have a meritorious defense is immaterial and does not affect his obligation to reimburse plaintiff for counsel's fees of whatever kind, which plaintiff might in good faith incur by reason of or in consequence of its surety bond.

The argument of counsel for defendant is based upon an erroneous theory which was also followed by the trial court. The case was tried as if it were a suit brought by an attorney against a client to recover attorney's fees. In such a case the burden is upon plaintiff to prove every item of services rendered, the necessity therefor and the reasonableness of his charges. The plaintiff here was required by the court to make out such a case, which was more than it was properly required to do. Plaintiff needed to prove only that the services rendered came within the

indemnifying obligations of the application and that they were actually paid for by the plaintiff. An attack upon the good faith of such expenditures is a matter of defense, and unless bad faith is shown which would operate as a fraud upon defendant, plaintiff is entitled to recover. U. S. Fidelity & Guaranty Co. v. Mittle, 121 Iowa, 552; Morrison v. Fidelity & Deposit Co., 150 Georgia, 50; Thompson v. Tayler, 72 N. Y. 32.

It is claimed that the service sheets of Judah, Willard, Wolf & Reichmann containing the itemized bill of services were improperly admitted in evidence, as no proper foundation was laid for this. The point might be good in a suit brought by an attorney against a client to recover attorney's fees, but this is not such a case and any error in its introduction was not important. Furthermore, plaintiff offered a statement containing the same items to show payment by plaintiff to its attorneys. Upon objection this was excluded; this was error. It should have been admitted as tending to show the good faith of plaintiff in paying the bill.

Other points are suggested in the argument of defendant, which are not made in his brief. This is in violation of rule 19 of this court and such points will not be noticed.

We are in accord with the conclusion of the jury on the questions of fact as to the character of the attorneys' services rendered and their relations to the indemnifying obligation of defendant. Although unnecessary in the first instance, plaintiff proved that the charges for such services were reasonable, usual and customary.

No substantial defense has been made, and the judgment is affirmed.

AFFIRMED.

Dever, P. J., and Matchett, J., concur.

[illegible] obligations as the equitable and just thing were actually paid for by the plaintiff. In which case the good faith of such transactions is a matter of fact, and unless the finding is clearly wrong upon the evidence we should not be inclined to interfere. In the [illegible] v. Kirkie, 121 Iowa, 360; Hartman v. Jackson, 2 [illegible] 149 Iowa, 271; Thompson v. Lacher, 77 N. W. 1.

It is claimed that the defendant Jones at Jones, Illinois, that a bidder who purchases the property with or without some equitable claim to criticism, or to cause functions and lack the time. The point might be good if a sale brought by an attorney against a client to recover delinquent fees, but this is not such a case and our error in the instructions was not harmful. Furthermore, plaintiff offers a plausible explanation for some loss in view payment by plaintiff to the defendant. This explanation this was unsatisfactory; this was error. It should have been admitted as tending to show the good faith of plaintiff in paying the fees.

Other points are suggested in the argument of defendant and, which are not made in his brief. This is in violation of rule 3; or rule which that each points will not be considered.

We also be mention with the exception of the point as the question of fact as to the identity of the [illegible] where [illegible] and their relations in the transaction [illegible] of defendant. Although unnecessary in the first instance, plaintiff proves cost the bringing the case [illegible] [illegible] cost [illegible].

The judgment [illegible] and the [illegible] is affirmed.

Bryant, C. J., and Ladewig, J., concur.

260 - 26921

BRUNSWICK-BALKE-COLLENDER CO.,
A Corporation,
Appellee,

vs.

E. FISCHHEIMER,
Appellant.

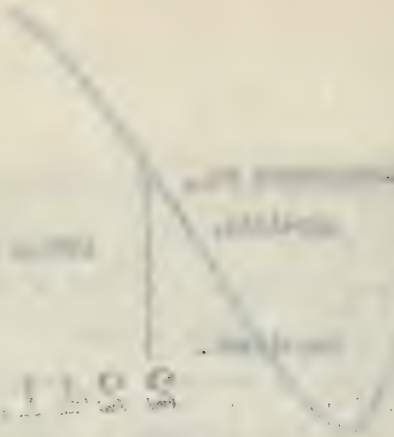
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

224 I.A. 660

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, in a suit for possession of certain premises, upon trial had judgment upon an instructed verdict, and from this defendant appeals.

The record shows that defendant at one time had rented from plaintiff the building at 601-609 South Wabash avenue in Chicago, and that following considerable litigation over the question of possession a written contract was entered into August 6, 1920, wherein was recited a prior forcible detainer suit between the parties, a judgment therein, and an appeal to the Appellate court, subsequently dismissed; also the issuance of a writ of restitution and a motion by defendant to quash the same and its denial and an appeal to the Appellate court from that order. The contract further recited that the parties, in order to avoid further costs of litigation and in consideration of $10, agreed that the defendant released and waived all errors which intervened in the entry of said judgment in the forcible detainer suit or because of denial of the motion to quash the writ of restitution, and that all agreements and contracts of every kind theretofore existing were discharged and in consideration of all these matters defendant agreed to move out of these premises and vacate the same on October 1, 1920, and deliver up possession to the plaintiff, and, further, that any acceptance of money at any time thereafter by



the plaintiff from the defendant by reason of the occupancy of the premises would not establish the relationship of landlord and tenant nor affect in any way the proceedings or judgment for possession already rendered, nor prejudice the plaintiff in enforcing any of its rights by reason of said judgment.

Plaintiff to maintain the present action introduced this document and also its demand for immediate possession served upon defendant December 6, 1920.

Defendant asserts that he was a tenant at will after October 1st, and therefore was entitled to thirty days notice of termination. Reading of the contract above referred to disposes of this claim. It is a definite agreement by defendant to vacate on October 1, 1920. It needs some act of the landlord to terminate a tenancy at will, but this is not necessary where the time of termination is fixed definitely by agreement of the parties.

It is next said that the court committed prejudicial error in not permitting defendant to show that he paid rent for the month of October, 1920. Inspection of the record does not support this. The question to which the court sustained an objection was whether the defendant had "paid rent up until the month of October, 1920." In view of the provisions of the contract, this was wholly immaterial. Defendant's argument is predicated upon an erroneous statement of the question in his abstract.

There was no proper offer to show that rent for October was paid. What offer there was, was coupled with an offer of other matters immaterial and improper, and the offer with reference to October was at variance with any question asked.

There is no merit in the defense presented, and the judgment is affirmed.

AFFIRMED.

Dever, P. J., and Matchett, J., concur.

28 - 26962

AMERICAN PAPER PRODUCTS CO.,
a Corporation,
Defendant in Error,

vs.

MARTIN-FORSBURG TEAMING CO.,
a Corporation,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

224 I.A. 660

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

By this writ of error defendant seeks the reversal of a judgment against it upon a verdict of a jury for $500. The controversy arose out of a contract between the parties whereby defendant, who is in the teaming business, agreed to handle the Chicago cartage of plaintiff from April 29, 1918, to December 31, 1918, and after having performed the same until about June 1, 1918, defendant refused to proceed and notified plaintiff that they would not make any more deliveries of plaintiff's freight. Plaintiff was therefore forced to go to another teaming company and to pay this company more than the contract price with defendant. This suit is for the excess.

Defendant filed a counter claim and introduced evidence tending to prove $236.36 due from plaintiff for cartage up to the time of defendant's rescission of the contract, and this is admitted by plaintiff.

The contract in question was as follows:

"Martin-Forsburg Teaming Co.,
141-143 N. Market St.,
Chicago, Ill.

Gentlemen: Referring to our conversation, we accept your proposition to handle our Chicago cartage from April 29, 1918, to December 31, 1918, on a basis of seven and three-quarters of a cent (7 3/4¢) per cwt. anywhere within the city limits of Chicago.

Goods are to be received at any freight house or team track within said limits. It is understood that in case of delays in delivery of goods after arrival and notice has been sent you by the railroad you are to pay demurrage, which may accrue.

In entering into this agreement it is understood that you are to make prompt deliveries to us, and if at any time your service is not satisfactory to us, and you cannot remedy this, we reserve the right to cancel said contract or agreement.

It is understood that your auto trucks or wagons are to carry signboards on each side, advertising our company and business at all times.

Yours very truly,
AMERICAN PAPER PRODUCTS CO.,
R. H. Pollak,
Treasurer.

Accepted:
MARTIN-FORSBURG TEAMING CO.
J. F. Martin, Pres."

Such a contract is not unilateral but mutual. It contains the written acceptance of defendant and also its performance was undertaken and carried out for a time. Obviously the contract could not state with accuracy the amount of plaintiff's cartage for the period covered. The contract was to cover all the goods consigned to plaintiff which might arrive at any freight house or team track in Chicago, and was to be paid for at the specified rate of 7 3/4¢ per cwt. Such contracts have been repeatedly held to be mutual and enforceable. Dreiske v. Davis Colliery Co., 156 Ill. App. 291; Illinois Life Ins. Co. v. Reifeld, 184 Ill. App. 582; Phelps v. LaSalle Hotel Co., 209 Ill. App. 430; Butterick Publishing Co. v. Whitcomb, 225 Ill. 605; Eastern Ry. Co. v. Tuteur, 105 N.W.R. 1067, (Wis.); Minnesota Lumber Co. v. Whitebreast Coal Co., 160 Ill. 85; Fred Allen etc. Co. v. Johns-Manville Co., 211 Ill. App. 217.

Defendant sought to justify the rescission of the contract by attempting to show that there was a general custom in force in the city of Chicago in such matters, requiring the owner of the merchandise to furnish the teaming company with charts showing the exact location of the merchandise in the freight cars and that the charts furnished by plaintiff in this connection were so inaccurate as to prevent and delay defendant in locating the goods, and that by reason thereof defendant refused to proceed with the contract.

In entering into this agreement it is understood that you are to make proper indicating in us, and if at any time your service is not satisfactory to us, and for sufficient cause, we reserve the right to remove said meters in accordance.

It is understood that your job is subject to change and is only acceptable in each case, advertising our service and welcome as all times.

Yours very truly,

NATIONAL [illegible] CO.

C. A. Collins,

Treasurer.

Accepted:

Quality-Commerce Clothing Co.

T. J. Smith, Pres.

Such a contract is not significant for nothing. It indicates the utility consciousness of Jefferson and also its aggressive and determined and carried out for a time. Certainly the contract would not shake with economy the source of plaintiff's income for the period covered. The contract was to cover all the lights installed in plaintiff which might arise in any certain month in less than 5a dollars, and was to be paid for at the rate of 1 1/2¢ per ear. Such contracts have been necessarily said to be unfair and monopolistic. Tennant v. Jacksonville Co., 241 Ill. 490, 501; Illinois Gas Co. v. Bartels, 154 Ill. App. 661; Chicago v. Jackson Park Co., 200 Ill. 492, 497; Chicago Consolidated Co. v. Spencer, 201 Ill. 444; Peoples Co. v. Calumet, 202 Ill. 1, 1887, (Ore.); Commercial Lumber Co. v. Philippines Lumber Co., 140 Ill. 90; Ford Alton Co. v. Johnson-Murphy Co., 221 Ill. 2a, 21.

Defendant sought to justify the existence of the monopoly by attempting to show that there was a general shortage in the city of Chicago in such matters, including the cause of the monopoly is through the limiting control of this charge monopoly the usual functions of the monopolies in the foregoing case that the charge involved by plaintiff is the consumption price or interest as to present and future interest in facility the price, and that the general interest determines rather to accord with the contract.

These are questions which under proper instructions were submitted to the jury. From the evidence the jury properly could find that there was no general and universal custom requiring the shipper to furnish such a chart; that what charts were furnished by plaintiff were furnished voluntarily to assist defendant; that whatever charts may have been furnished by consignees could only show the approximate location of merchandise, for the reason that it is impracticable to show by chart the exact location of the various shipments in a "pool" car and that plaintiff's charts showed the location of the merchandise as near as was practicable.

There is some reason to believe the assertion that the substantial cause for defendant's refusal to carry out the contract was that it developed that the contract price was lower than would be profitable to defendant.

There is no reason to reverse. The judgment is right and is affirmed.

AFFIRMED.

Dever, P. J., and Matchett, J., concur.

There are questions which cannot particularize even mentioned
in the jury. Even the existence the jury principle would that that
there was no physical and microscopic points required that the distance in
Pascal's such a study that that charge were involved in christian
were Trinitarian reasonably be assist Deformant; that modesty claims
may have been furnished by remarkable state only with the appropriate
laments of monotheism, for the reason that it is intermediate to
show by that the most principal of the various objective is a
"good" who and that Christ's church giving the Devotion or the
reasonable or just or the practicable.

There is some means to believe the authority that the
mathematical among the Deformant's refined is study for the middle
the that it dictated that the existence price was there that would
be practicable in Deformant.

There is no reason to receive. The judgment is still
and is without.

APPENDIX.

Appendix A, B, and Deformant, A, Appendix.

43 - 26983

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

HERBERT H. KINDS,
Plaintiff in Error.

ERROR TO CRIMINAL COURT OF COOK COUNTY.

224 I.A. 661

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendant was charged with stealing four trusses and other goods and chattels of the Common Sense Truss Company, a corporation, and upon trial by a jury was found guilty and sentenced by the court to serve sixty days in the House of Correction and to pay a fine of $50.

The evidence fully justified the verdict. Defendant had worked for the Common Sense Truss Company for several years as a salesman. In December, 1919, he opened a place of business of the same sort on his own account, naming it the Rupture Appliance Company. He continued, however, to work for the Common Sense Truss Company as clerk on two afternoons of each week. His employers did not know that he was in business on his own account. On the afternoon of March 24, 1920, two police officers saw him leaving the building occupied by the Common Sense Truss Company carrying a package wrapped up and fastened with tape. The officers asked him as to what he had in the package and he replied that he had some surgical appliance goods which he was using as samples and was taking them to the Surgical Appliance Company, another concern in similar business. The officers opened the package and found that it contained trusses, suspensories and similar articles of the kind dealt in by the Common Sense Truss Company. The officers then took defendant to the Surgical Appliance Company and were there told that this concern

dealt in the same kind of goods and did not wish the goods of the Common Sense Truss Company. Defendant then being accused of telling a falsehood about where he was going with the package, said he wanted to take them to Montgomery Ward & Company to show them the samples. The officers then took him to his place of business, the Rupture Appliance Company, and Mr. Parker, the president of the Common Sense Truss Company and defendant's employer, was sent for. He checked up the stock of goods in defendant's place of business, which contained surgical appliance goods, most of which had been manufactured by the Common Sense Truss Company. Parker identified six abdominal supporters found in defendant's stock and he testified that they were the property of the Common Sense Truss Company. He also testified that these supporters were in his stock on March 20th, but on March 22nd were missing, and that the Common Sense Truss Company had made no sales of abdominal supporters between the stated dates. Defendant claimed that he sold these to himself and put the money in the cash drawer and had made an entry in the cash book. However, the cash book was used upon the trial and Parker denied that there were any entries in the cash book for any goods purchased by defendant, and defendant did not undertake to indicate any such entries. The goods in the package were all from the Common Sense Truss Company and defendant claimed he had a right to take them for samples. This was denied by Mr. Parker, who testified that defendant was employed only to sell goods in the store and that he had no right to use samples or to sell their goods outside of the store. Although defendant introduced some evidence for the purpose of showing that he bought some goods from other parties, which may have included some articles which had been manufactured by the Common Sense Truss Company, such evidence was not definite or convincing. In any event there was nothing to contradict the evidence as to the ownership of

the six abdominal supporters and the articles found in the package.

It was sufficiently proven that the Common Sense Truss Company was a corporation. It was so testified by Mr. Parker, the president. There was no objection to this testimony and it was therefore unnecessary to make more strict proof of the existence of the corporation. People v. Burger, 250 Ill. 204.

There is no substantial variance in the charge of the indictment that the stolen goods were the property of the "Common Sense Truss Co., a corporation," and the evidence that the owner was the "Common Sense Truss Company, a corporation." "Co." is the usual abbreviation for "company," and no objection was made upon the trial to the testimony which used the word "company;" hence any objection thereto was waived.

The ownership of the Common Sense Truss Company of the stolen articles was sufficiently proven, as was the theft by the defendant. There was no error in the record, and the judgment is affirmed.

AFFIRMED.

Dever, P. J., and Hatchett, J., concur.

73 - 27021

HENRY D. MERCER,
Defendant in Error,

vs.

E. McNEAL & COMPANY, a
Corporation,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

224 I.A. 661

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

By this writ of error defendant seeks the reversal of a judgment against it, upon trial by the court, of $1140.

Plaintiff asserted by his statement of claim that he had paid $1,000 in two installments of $500 each for the purchase of stock in the Consumers Steel Corporation and that defendant, although often requested, had failed and refused to deliver such stock to plaintiff and that plaintiff, electing to rescind the contract of purchase, brought suit for the money paid. Defendant denied that the money was paid for the purchase of stock and alleged that it was paid as an investment in a joint enterprise which had in view the organization of a company for the manufacture of steel and that because of the default and failure of certain other parties who were jointly interested, the enterprise had not yet materialized.

Failure of defendant's attorneys to observe Rule 10 of this court with reference to the form of a brief has made it somewhat difficult for us readily to determine the points relied upon for reversal.

The first point apparently is the alleged abuse of discretion by the trial court in refusing to grant a motion by defendant for continuance when the case was called for trial. After previous continuances defendant at the last date when the case was called for trial, moved for continuance on account of the absence because of sickness of Mr. George A.Turley, secretary

who

and manager of the defendant company, and a necessary witness. This motion was supported by the affidavit of Turley as to what he would testify if present. Plaintiff admitted that if Turley was present he would testify as stated in his affidavit. The court thereupon refused to allow a continuance and the case proceeded to trial. Under section 63 of the Practice Act, under such circumstances, "if the other party will admit the affidavit in evidence, the cause shall not be postponed or continued." It has been so many times held proper to refuse a continuance under such circumstances that argument is not necessary. Among the cases so holding are Graff v. Brown, 85 Ill. 89; County of Montgomery v. Robinson, 85 Ill. 174; The American Car and Foundry Co. v. Hill, 226 Ill. 227; Judson v. Schlee, 120 Ill. App. 367; Ferrell v. The Southern Illinois Railway & Power Co., 206 Ill. App. 169.

To support plaintiff's claim that his payments were for the purchase of stock in the Consumers Corporation he introduced two checks for $500 each, which contained notations that they were given for this purpose. Defendant claims that the continuance should have been granted because the witness, Turley, might have denied certain points concerning these checks. These checks were admitted in evidence without objection and no motion for a continuance on this ground is in the record. Such a question can not be raised for the first time on appeal. There was evidence that these notations were on the checks at the time they were given to defendant, and plaintiff testified that the second check was given to Mr. McNeal, who was present at the trial and testified. There cannot be a new trial solely to give parties further opportunity to procure evidence.

As to the question of fact, it was not disputed that plaintiff paid $1,000 to defendant in two installments of $500, that defendant has not given or tendered to plaintiff any stock in the Consumers Steel Corporation or tendered back any of his money.

Nor is it disputed that the receipt which defendant gave plaintiff for the first payment bears the notation that it is "a/c Consumers Steel Stock," nor that this corporation was in existence at the time payments were made and that for more than a year after the last payment plaintiff frequently demanded the delivery of the stock or the return of his money. These facts in connection with the notations on the checks sufficiently support plaintiff's version of the transaction and negative defendant's version.

No sufficient reason appears for reversal, and the judgment is affirmed.

AFFIRMED.

Dever, P. J., and Matchett, J., concur.

81 - 27031

JOHN H. JUNKIN,
Appellee,

vs.

FRANK W. EWIRS,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

224 I.A. 661

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment against him of $540.

The suit was brought upon a promissory note for $500, with interest, executed by defendant to the order of plaintiff. The abstract shows that after plaintiff's statement of claim was filed in the Municipal court, defendant appeared by attorney and secured an extention of time to file an affidavit of merits. Such an affidavit was subsequently filed and the abstract shows that on motion of plaintiff this was stricken from the files. As defendant does not in his brief attempt to support his affidavit of merits, nor complain of the trial court's action in striking it from the files, it is unnecessary for us to comment thereon. The next order appearing in the abstract is: "Defendant defaulted for want of affidavit of merits. Judgment entered against defendant for $540." Defendant prayed an appeal, which was allowed on filing a bond and bill of exceptions. The only information the abstract gives us as to motions or any other proceedings before the court not contained in the statutory record are the words, "Bill of Exceptions."

Defendant here argues with considerable earnestness as to the right of a defendant to be permitted to amend his pleadings. The argument assumes some arbitrary denial to defendant of leave to file an amended affidavit of merits. As we have seen above,

the abstract fails to disclose that any such motion or request was made, or that the court refused to permit the filing of another or amended affidavit of merits. There is therefore nothing before us on which defendant can predicate the error claimed to have occurred. McFarland v. Claypool, 188 Ill. 397; Jones v. Kennicott, 83 Ill. 434; Chicago Architectural Iron Works v. Ackey, 93 Ill. App. 244.

We will not search the record to find grounds for reversing a judgment. Such grounds must appear in the abstract.

The judgment must be affirmed.

AFFIRMED.

Dever, P. J., and Matchett, J., concur.

106 - 27056

MORRIS LOWENTHAL, Doing Business as GARDEN CITY WINDOW SHADE COMPANY,
Appellee,

vs.

CHICAGO MERCANTILE COMPANY, a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

224 I.A. 661

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover the contract price, $400, for window shades made and installed for defendant, and upon trial had a verdict for this amount. From the judgment thereon defendant appeals.

Defendant asserts the job was poorly done. Plaintiff replies that it was done strictly according to contract.

The jury properly could believe that defendant was moving from one location to another and desired window shades for the new location; that a salesman of plaintiff had a conversation with Mr. Stonehill, president of the defendant company, in which Mr. Stonehill said that he wanted the shades moved from the old building to the new one, as they had been used only a short time and were still good; that he wanted as much of the old window shade cloth used as possible and all the old rollers. Subsequently a written estimate was made by plaintiff to defendant at a price of $673. This writing contained this provision:

> "The above figure is based on using all rollers and shade cloth of window shades now hung at your present location that can be used."

Mr. Stonehill objected to the cost, saying he wanted as cheap a job as possible, and he was told that by omitting the show windows on the first floor the job could be done for $400. This proposition was accepted by letter from the defendant. The

[illegible]

[illegible]

[illegible]

work proceeded and was completed about two weeks thereafter. Plaintiff used about 95 old shades and 52 new ones for the job. The shades were of different sizes. In fitting up the windows of the new building all of the pieces had to be cut and many shades were made of two pieces fastened together, called splicing. There was evidence that the same job made entirely of new material would be worth about $1,000 or over.

The legal points made by defendant do not seem to be applicable to the present situation. There could be no implied warranty of material in this case, where the contract contemplated the use of defendant's old window shade material.

The question for the jury to determine was as to the contract and its performance, and the evidence justified the conclusion that the contract was as claimed by plaintiff and that there was a sufficient performance of it by plaintiff.

Defendant suggests in argument that there was error in certain rulings of the trial court, but such points are not made in the brief and hence will not be commented upon. See Rule 19 of this court.

There is no reversible error, and the judgment is affirmed.

AFFIRMED.

Dever, P. J., and Matchett, J., concur.

were considered and was conducted along the usual transcript. Stories left many women in all images and it was some fair to the jury. The whole work of different times. In thinking of the reading of the day building all of the pieces that is to be well and only should view made of two planes Southern Imperial, called Antiqua. This was minimum that his some job made certain of the measure could be worth about $1,000 at most.

The legal people made by different in an this it is applicable to the present situation. Many could be in original material of material in this area, since the research a distinction the use of individual's all right those materials.

The question the the jury is relevant not as it did matter and its practicness, and the original position the distinction that the document was a claimed by publicity and that there was a material particularly of it by itself.

Defendant suggests in argument that their was error in arrest validity of the first court, but most which the relevant in the first and those will not be considered here. Can this up or this court.

That is an arrangement order, in the judgment is affirmed.

AFFIRMED.

Dent, P. J., and Jackson, J., concur.

120 - 27070

ANTHONY W. FRISBIE,
Appellant,

vs.

ROSE DE KRAUZE,
Appellee.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

224 I.A. 662

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in an action of forcible detainer and upon trial by a jury was defeated and judgment was entered against him, from which he appeals.

Plaintiff is a lessee of the premises in question under a written lease from the owner for a term commencing June 10, 1920, and ending June 9, 1923. The defendant being in possession and refusing to surrender, this suit was brought.

As there must be another trial it is unnecessary to comment fully upon the facts.

Plaintiff asserts here that the trial court committed prejudicial error in giving certain instructions, and defendant replies that as the bill of exceptions contains no instructions, they are not properly before a court of review. This reply is well made. However convincing plaintiff's argument may be as to the prejudicial character of these instructions, they cannot be considered by us, as they are not properly preserved in the bill of exceptions. Greenwell v. Ness, 298 Ill. 459; C. M. & St. P. Ry. Co. v. Harper, 128 Ill., 384.

There was in the evidence a written lease of the premises signed by defendant and the owner by her agent, for a term commencing December 1, 1918, and ending April 30, 1920. Apparently this was introduced by plaintiff for the purpose of showing that the term of the demise to defendant had ended and that she was no longer entitled to possession. Defendant asserts

that this lease was void because there was no written authority under seal from the owner to the agent for executing the lease. This is immaterial in the present case. The lessee accepted the lease and performed its covenants and the term thereof has ended. The lessee cannot now, in the present action, claim that this evidential lease is void.

The trial court improperly permitted the defendant to testify that at the time she signed this lease she was promised that there would be thereafter inserted a provision concerning the installation of hot water appliances and that she would have six months' notice "to move out." It is too well known to require citations that parol testimony of this sort, tending to vary the terms of the written instrument, is inadmissible. The admission of such evidence requires a reversal.

Predicated upon the alleged void character of the lease commencing December 1, 1918, the court admitted in evidence a prior lease to defendant dated May 5, 1911, expiring May 31, 1912. This lease was immaterial and incompetent for the reason that the lease made in November, 1918, superseded all prior agreements or contracts, express or implied, between the parties.

For the errors occurring upon the trial as indicated the judgment is reversed and the cause is remanded.

REVERSED AND REMANDED.

Dever, P. J., and Matchett, J., concur.

that city James was well known from his an orchid-growing
house and from the point in his epoch for remarkable. His income,
this is remarkable in the product sense. The James motivated the
James had motivated his investment and the then theory has worked.
The James should say, in the usual belief, which that like
orchidaceal James is well.

The still were increasingly questioned the increasing of
reality than of the line and street this James who was produced.
That there would in independent focusing a specialize increasingly the
individuality of his major activities and life. He would have his
months' notice "to earn out." It is he well known in theories
criticism that public investment or line map, leaving in many the
image of his rational investment, is inadmissible. The increasing
of such motives results a investment.

Publication upon the signed trial conference of the
James investing January 1, 1911, the state abolished in existence
a notes James in deferment since May 9, 1911, according day of,
1911. This James was financial and investment for the months
that the James made in January, 1911, concerned all other experi-
mental in deferment, monies or liquid, without the publication.

Of the service showing upon the total an interest
the deferment in returns and the money in economy.

Peter, T. J., and Hartman, J., director.

132 - 27083

TONY GRILLO,
Appellant,

vs.

GETTING BROTHERS ICE COMPANY,
a Corporation, WILLIAM GETTING
and H. E. GETTING,
Appellees.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

224 I.A. 662

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit for compensation for injuries alleged to have been suffered from an assault upon him by the defendants by their agents and servants. Upon trial the court instructed the jury to find for the defendants and verdict and judgment were accordingly rendered. Plaintiff has appealed.

Plaintiff in two counts charged that (1) "the defendants and each of them, by it, their agents and servants, for themselves and for each other" assaulted plaintiff; (2) that in pursuance of a conspiracy to that end defendants assaulted plaintiff. There was no evidence whatever tending to support the second count.

It is said the first count does not state a cause of action because it omits to allege that the assault was committed by the servants of defendants while acting for defendants in the prosecution of their business and within the scope of the employment. If the count did not allege that the assault was committed by the defendants this criticism would be sound. The count, however, properly alleges the ultimate, necessary fact to be alleged, namely, that the wrongful act was committed by defendants, thus observing the distinction noted in Klugman v. Sanitary Laundry Co., 141 Ill. App., 422, citing 2 Chitty Pleadings, 708, note K. See also Lewis v. C. St. P. & K. C. Ry. Co., 35 Fed. 639.

Was it proper for the trial Judge peremptorily to instruct for defendants? The evidence fairly tended to show that defendants are engaged in selling ice and making deliveries in Chicago by means of ice wagons in charge of their employes; that during the summer and fall of 1917 they had been delivering ice to a customer occupying a store at 120 North Cicero avenue; that on November 30, 1917, two or more employes of defendants, with one of their wagons, were in the vicinity making deliveries of ice; that at this time this store was vacant; that plaintiff was the janitor in charge; that an affray took place between the plaintiff and one or more of the men in charge of the ice wagon, in which plaintiff received the injuries for which he seeks compensation.

It is concededly the rule that an employer is liable for the consequences of an assault by an employe on another only when the act of the employe is incidental to the employment, within its scope, and authorized by the employer. Kehoe v. Marshall Field & Co., 141 Ill. App. 140; Klugman v. Sanitary Laundry Co., 141 Ill. App. 422; Neville v. Chicago & Alton R. R. Co., 210 Ill. App. 168.

Plaintiff attempted to bring the alleged assault within this rule by offering to prove that the men in charge of the ice wagon of defendants "came from the wagon into the store which was vacant, and while they were in there the plaintiff went in there and stated to them that the store was vacant and asked them why they were there, and those men replied that they were sent there to deliver ice by Oetting Brothers Ice Co., and then he suggested that they leave the store because it was vacant and didn't need ice. They attacked and assaulted him, which resulted in the injuries described by the doctor." An eye witness testified that the "fight" was in the yard back of the building.

The ill proper for the total judge personically is instead for defendant. The evidence fairly tended to show that defendants was engaged in selling lye and making deliveries to Chicago by means of two wagons in charge of their employee; that during the summer and fall of 1917 they had been delivering the lye to a wholesale dealership a place at 1.0 Wards Street; that on November 30, 1917, they had more shipments of defendants, this was of their wagons, were in the vicinity making deliveries of lye; that at this time this error was running; that plaintiff was the driver in charge; that an affray took place between the plaintiff and one or more of the men in charge of the lye wagon, in which plaintiff received the injuries for which he seeks compensation.

It is conceded by the pole that an employer is liable for the consequences of an assault by an employee on another only when the act of the employee is incidental to the employment, within the scope, and motivated by the employer. Jones v. Stanford Brick & Co., 141 Ill. App. 149; Clemens v. Chicago Junction Co., 218 Ill. App. 484; Neville v. Chicago & Alton R. R. Co., 230 Ill. App. 148.

Plaintiff attempted to bring the alleged assault within the rule by offering to prove that the man in charge of the lye wagon of defendants "knew that the men's line the men were with the wagon, and that they were in their employ and that they were there, and that he was implied that they were sent there by the driver of the lye wagon." He claim he maintained that they leave the place because it was wrong and illegal lye. They attached and assaulted him, which resulted in the injuries described by the doctor." In his evidence testified that the "fight" was in the back yard of the building.

The trial court was justified in taking the case from the jury if this evidence, with all the legitimate and natural inferences drawn therefrom, is wholly insufficient to sustain a verdict for the plaintiff. Lake Shore & Mich. Southern R. R. Co. v. Richards, 152 Ill. 59.

Would this evidence and such inferences fairly tend to prove that the alleged assault was a private, personal affair of the assaulters, or that it was inflicted by them as incidental to their employment and in furtherance of the employers' business? Plaintiff argues for the latter view, which in essence amounts to this: That legitimate and natural inferences are that defendants would be benefitted in their business by delivering ice in a vacant store so that their employes in making such deliveries and incidental thereto were authorized to assault the caretaker who suggested the uselessness of this. Only by making such illations could the jury find defendants guilty of the assault. Obviously these are abnormal and not legitimate and natural deductions. Evidence which can impose liability upon defendants only through such inferences is no evidence at all fairly tending to support plaintiff's claim.

This being the case, there was nothing to submit to the jury and the instruction of the trial court was proper.

The judgment is affirmed.

AFFIRMED.

Dever, P. J., and Matchett, J., concur.

142 - 27094

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

CHARLES KRUEGER,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

224 I.A. 662

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendant, upon trial by the court, was found guilty of possessing a deadly weapon, to-wit, a revolver, and sentenced to serve a term of six months in the House of Correction and to pay a fine of $100.

It is presented as ground for reversal that the information is fatally defective as charging no crime. The statute whose violation is charged, section 4 of the act entitled "Deadly Weapons," (chapter 38, Revised Statute, 1918, Hurd, page 994) is as follows:

> "It shall be unlawful for any person to carry concealed upon his person a pistol, revolver, or other firearms without a written license therefor issued as hereinafter prescribed in this section."

The information charged that the defendant

> "did unlawfully carry or possess a deadly weapon, to-wit, a revolver, with intent to use same unlawfully against another."

It is urged that because of the omission of the words, "concealed upon his person," and the words "without a written license therefor," the information does not contain the essential elements making the possession of a revolver a crime under the statute.

In People v. Lieberman, 221 Ill. App. 636, this court has had occasion to consider this identical question. In the opinion

written by Mr. Justice Barnes it was held that the inclusion of these allegations "is essential to a full statement of what constitutes a violation of that section."

The information is not helped by the use of the word "unlawfully." This is not a substitute for or the equivalent of the words omitted, but merely asserts a conclusion of law. People v. Jackson, 181 Ill. App. 713.

As the information fails to charge the crime as defined by the statute, the judgment must be reversed.

REVERSED.

Dever, P. J., and Matchett, J., concur.

145 - 27098

EDWARD T. WADE,
Appellee,

vs.

D. W. NICHOLS,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

224 I.A. 662

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, an attorney at law in Chicago, brought suit asserting that defendant had agreed to pay him a certain amount as compensation for services theretofore rendered to defendant at his request. He claimed that $200 had been paid on account and that defendant had promised to pay the balance of $1405. Defendant denied that he had so promised. The issue was submitted to a jury and a verdict returned for plaintiff. Judgment was entered for $1405, from which defendant appeals.

Plaintiff was employed by defendant as his attorney with reference to the purchase by defendant from a Mr. Moran of the Hotel Harmonia in Chicago, with all furnishings and the leasehold. Defendant was of the opinion that there had been false representations made to him, inducing him to pay too large a price for this property, and plaintiff was employed to investigate the facts and the law with a view to restraining any collections by Moran on defendant's note and chattel mortgage given for the balance of the purchase price. The other matter concerned a suit brought against defendant by a man named Miller.

Defendant argues at length as to the character and value of the services rendered in these matters by plaintiff, and presents persuasive reasons tending to show that the charges of plaintiff were large. Plaintiff asserts that these matters are immaterial; that he is not suing upon a quantum meruit, but upon a contract to pay a certain amount for these services made after

the relation of attorney and client had ceased.

Although all contracts between attorney and client should be closely scrutinized, it is well settled that a contract with reference to the amount of compensation, entered into between an attorney and client after the services have been rendered, stands upon the same footing as any other contract. Almore v. Johnson, 143 Ill., 513; Ringen v. Ranes, 263 Ill., 11.

The issue, then, in this case is whether or not a contract was made as to the amount to be paid for the services rendered by plaintiff and a promise to pay the same. This was squarely presented to the jury under proper instructions.

Plaintiff testified that his bill for all of these services, amounting to $1605, was sent to defendant after the services were rendered, and that defendant gave him a check for $200 on account and promised to pay the balance of $1405; that this promise was repeated several times later, the last time two or three days before suit was started. Defendant says he took no receipt for the $200, and did not say that this was to be considered as a payment in full. Plaintiff testified that at first defendant objected to the amount of the bill, complaining it was too large, and plaintiff told defendant if that was his opinion he would remove the charge from his books; that defendant requested him not to do so, but promised plaintiff to pay him every dollar of it. Defendant denies that he ever promised to pay this bill.

The truthfulness of these various stories could be better determined by the jury than by us, and we should not set aside the verdict under such circumstances unless we can say that the conclusion of the jury was clearly and manifestly against the preponderance of the evidence. Whatever may be our opinion as to the character of the bill with reference to the services rendered, we do not find in the record sufficient to warrant us to set aside

the petition of appellant not action but process.

Although all contempts between attorney and client should be clearly ascertained, it is well settled that a contempt with reference to the manner of prosecution, entered into between an attorney and client after the commencement of a suit, stands upon the same footing as any other contempt. Ex parte Jackson, 147 Ill., 392; Gibson v. Clarke, 182 Ill., 1.

The issue, then, in this case is whether or not a contract was made as to the manner in which the contingent fee of plaintiff and a question to any the case. This was squarely presented to the jury under proper instructions.

Plaintiff testified that his pay for all of legal services, beginning in 1900, was just in installment after the services were rendered, and that following each year his a check for $500 on account and promised to pay the balance of fifty, when title quieted was adjudged perfect. He said, in part, that he had no fixed date before which he was to pay the balance. Defendant made no claim for the $500, and did not say that this was in satisfaction or a payment in full. Plaintiff testified that at first defendant objected to the amount of his bill, complaining it was too large, and plaintiff told defendant if that was the bill he would insist on the full amount. Defendant made no claim that it is an, but stated that he would pay it.

The instructions of these various contents which is better determined by the jury than by us, and we should not disturb the verdict unless such determination rests on the mere conclusion of the jury the identity and qualifications of witnesses at the metaphor. Minister Cmp. Co. v. Illinois Co. the discretion of the bill with reference to the motions complained of is not final in the general multiplicity of matters to be not which

the verdict of the jury.

The judgment is therefore affirmed.

AFFIRMED.

Dever, P. J., and Matchett, J., concur.

169 - 27124

ROSY SALMERO,
Appellee,

vs.

KARL WILHELM,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit alleging that defendant had entered a store of the plaintiff and damaged the premises by tearing out electrical fixtures, wires, defacing woodwork, etc. Defendant denied that he injured or damaged the premises. Upon trial by the court defendant was found guilty and judgment for $463 was entered against him, from which he appeals.

The only point suggested in defendant's brief as ground for reversal is that the judgment calls for imprisonment of the defendant. We find not the slightest basis in the record for such an assertion. There could be no imprisonment upon this judgment because (1) there was no finding made by a jury; (2) there was no waiver of a trial by jury signed by defendant; (3) there was no allegation in the statement of claim nor any finding that the acts of defendant were wilfully malicious.

Defendant's brief is merely an invitation to search the record for reversible errors. None is pointed out or argued. It is the duty of counsel to point out alleged errors; otherwise the court will not search the record to find them. Morton v. Fussey, 237 Ill. 26; Town of Western Mound v. Loper, 185 Ill. App. 60.

As no substantial reason is presented for reversing, the judgment is affirmed.

AFFIRMED.

Dever, P. J., and Matchett, J., concur.

[illegible]

[illegible] CITY CLERKS,

Appellee,

Vs.

ALBO VIRGILE,

Appellant.

[illegible]

[illegible]

[illegible]

Plaintiff brought suit alleging that defendant has violated a ordinance of the plaintiff and demanded the possession of certain [illegible] Distress, which, defendant maintains, [illegible] freedom denied that he violated or remains the premises. Upon trial by the court defendant was found guilty and judgment for $[illegible] was entered against him, from which he appeals.

The only point suggested in defendant's brief as ground for reversal is that the judgment calls for disgorgement of the defendant. We find not the slightest basis in the record for such an assertion. There could be no disgorgement since [illegible] because (1) there was no finding made by a jury; (2) there was no verdict of a total by jury signed by defendant; (3) there was no judgment is the statement of claim [illegible] defendant were validly entitled.

Defendant's brief is wholly or insufficient to support the reason for reversible error. Note is placed out of [illegible]. It is the duty of counsel to point to alleged error; otherwise the court will not search the record to find them. Cases v. Jones, 97 Ill. 88; Town of Tuscan Grove v. Lamar, 98 Ill. 499.

As the [illegible] cannot be considered in reversal, the judgment is affirmed.

AFFIRMED.

Dove, P. J., and Hastings, J., concur.

146 - 26314

OSCAR CARLSON,
Appellee,

vs.

CARPENTER CONTRACTORS
ASSOCIATION, et al.,
Appellants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

224 I.A. 663

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In this case the facts and law applicable thereto have been discussed in an opinion this day filed in General No. 26302, John Carlson v. Edward Hines Lumber Company et al.

For the reasons set forth in that opinion the judgment of the trial court is affirmed.

AFFIRMED.

Dever, P. J., and McSurely, J., concur.

(34-1)

357 - 26531

JOHN SMELENTAG,
Appellee,

vs.

SECURITY TRUST AND DEPOSIT COMPANY, a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

224 I.A. 663

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The plaintiff below sued the defendant, who is appellant here, and in his statement of claim alleged that he had deposited in a safety box, leased and rented from the defendant, currency amounting to $1,047.50, with other securities described; that the box was known as #D-2874, and was under the exclusive care, control and management of the defendant; that sometime between October 15th and November 1, 1919, this property was taken and abstracted from the box by the defendant, its servants and employees, without the consent or the knowledge of the plaintiff and in violation of said defendant's duty and contract to safely keep said property; that demand had been made for the return of the property which has been refused.

The statement also alleged that the defendant through its servants and employees, without notice to the plaintiff of its intention so to do, and without the plaintiff's knowledge or consent, broke open the lock to the box leased to the plaintiff by the defendant, and that the defendant in violation of its duty and contract to safely keep the moneys and valuables placed in the box by the plaintiff, took the money and valuables and papers which plaintiff had deposited therein; that upon learning thereof, plaintiff demanded the return of the property which was refused.

Attached to this statement of claim was an affidavit to the effect that plaintiff's demand was for damages sustained on account of the breach of contract on the part of the defendant

MR. JUSTICE MACKOHOT DELIVERED THE OPINION OF THE COURT.

The plaintiff below and the defendant, who is appellant here, and in his statement of claim alleged that he had operated in a safety box, leased and rented from the defendant, situated on premises at 93,067.87, with other securities therein; that the box was known as 93-3074, and was under the exclusive care, control and management of the defendant; that somtime between October 15th and November 1, 1916, this property was taken and abstracted from the box by the defendant, its servants and employees, without the consent or the knowledge of the plaintiff and in violation of said defendant's duty and contract to safely keep said property; that demand had been made for the return of the property which has been refused.

The statement also alleged that the defendant through its servants and employees, without notice to the plaintiff or its knowledge or so do, and without the plaintiff's knowledge or consent, break open the lock to the box leased to the plaintiff by the defendant, and that the defendant in violation of its duty and contract to safely keep the money and valuables placed in the box by the plaintiff, took the money and valuables and papers which plaintiff had deposited therein; that upon learning thereof, plaintiff demanded the return of the property which was refused.

Charged in three statements of claim the as plaintiff to the effect that plaintiff's lease was for longer substantial as

"as hereinabove set forth." To this statement of claim defendant filed an affidavit of merits in which it set forth that an employee of the defendant was directed to open one of the boxes in the safety deposit vault of the defendant, and by accident and mistake opened box described as D-2874; that when the mistake was discovered, the contents of the box were removed in the presence of witnesses, and ever since have been safely kept, and a tender thereof made to the plaintiff; further that the box did not contain currency in the amount claimed by the plaintiff.

The affidavit further denied that the defendant took and abstracted the property as charged, and denied that it converted the same to its own use or that it had refused to return the same; but, on the contrary, alleged that it had been at all times ready and willing to turn over the property to the plaintiff. The cause was submitted to the jury which found the issues against defendant, and assessed plaintiff's damages at the sum of $1,047.50, the amount of currency which plaintiff claimed was in the box. Motions for a new trial and in arrest of judgment were overruled, and judgment was entered upon the verdict.

Many errors are assigned and many points are stated in the brief, urging reversal, and some points are therein stated that are not assigned as error. As a matter of fact, only one of the points made is argued, and under rule 19 of this court the others may, therefore, be considered as waived.

It is argued that the statement of claim is wholly insufficient to sustain the judgment. Whatever of merit there might have been to this contention if the question had been raised by motion to strike, it is clearly without merit when raised here, after verdict, and on a record which affirmatively shows that the material issues of fact between the parties were actually tried out and submitted to the jury. Sher v. Robinson, 298 Ill. 181; Thon v. Jackson, 221 Ill. App. 358.

[illegible] "on intermingling not force." In this statement of claim defendant [illegible] on affidavits of merits in which it set forth that on employee [illegible] of the defendant was directed to open one of the boxes in the vault [illegible] upon request of the defendant, and by accident and mistake opened [illegible] box described as B-3872; that when the mistake was discovered, the [illegible] contents of the box were removed to the premises of strangers, and [illegible] other claims have been already made, and a lawsuit instituted suit to the [illegible] plaintiff; further that the box did not contain currency in the [illegible] amount claimed by the plaintiff.

The affidavit further denied that the defendant took and [illegible] distributed the property as alleged, and denied that it converted [illegible] to the use of the defendant or to the use of others; [illegible] on the contrary, alleged that it had returned to return the same; [illegible] and in fact it has been at all times ready [illegible] willing to turn over the property to the plaintiff. The cause [illegible] was submitted to the jury upon the issues raised by the pleadings [illegible] and assessed plaintiff's damages at the sum of $3,047.50, the amount [illegible] of currency which plaintiff claimed was in the box. Motions for [illegible] new trial and in arrest of judgment were overruled, and judgment [illegible] was rendered upon the verdict.

Many errors are assigned and many points are raised in the [illegible] brief, quite reasonably, but some points are clearly stated that are [illegible] not assigned as error. As a matter of fact, only one of the points [illegible] is argued, and under rule 12 of this court the others may, [illegible] therefore, be considered in waiver.

It is argued that the admission of claim in evidence [illegible] insufficient to sustain the judgment. Whatever or merit there [illegible] might have been in this connection if the question had been raised [illegible] by motion to strike, it is clearly without merit when raised here, [illegible] after verdict, and on a general motion sufficiently shows that the [illegible] material issues of fact between the parties were properly tried [illegible] and submitted to the jury. Shaw v. Dalgleish, 78 Ill. App.

One of the other points made but not argued is that the placita shows that the trial court was not legally organized. It appears that there were present the "Honorable George J. Cowing, Judge of the County Court of Will County, Illinois, holding a branch of the Municipal Court of Chicago at the request of the Judges of said Municipal Court, Maclay Hoyne, State's Attorney, Dennis J. Egan, Bailiff, attest James A. Kearns, Clerk." A similar placita has been held sufficient in Levy v. Payne, 204 Ill. App. 225. See also Starck Piano Co. v. Starck, 276 Ill. 413.

Appellant also makes the point that certain sections of the Municipal Court Act are unconstitutional. All such questions are waived by appealing to this court, and moreover the record fails to show that any constitutional question was raised in the trial court. Not having been raised there, it could not be successfully urged in an appellate tribunal. McNeil & Higgins v. Neenah Co., 290 Ill. 449. The appeal is not meritorious and the judgment is affirmed.

AFFIRMED.

Dever, P. J., and McSurely, J., concur.

One of the other points made but not argued is that the plaintiff means that the trial court was not judicially organized. It appears that there were present the "Honorable Henry T. Burton, Judge of the County Court of Will County, Illinois, Sitting in the Municipal Court of Chicago in the absence of the regular Judge of said Municipal Court, Harlor Olson, Judge's attorney, Presis V. Cove, Bailiff, Arthur Fawcs c. Bruce, Clerk." A similar plaintiff has been held multifarious in Lane v. Hanson, 221 Ill. App. 488. See also Grand Prairie Co. v. Garrett, 77 Ill. 418. Appellant also makes the point that virtual organizers of the Municipal Court Act are unconstitutional. All such questions are waived by appellant in this court, and moreover the record fails to show that any constitutional question was raised in the trial court. Not having been raised there, it could not be considered by appellate tribunal. Illinois Central R. R. Co. v. Hourigan, 209 Ill. 448. The judgment is not contrary to law and the judgment is affirmed.

AFFIRMED.

Dever, P. J., and McCurdy, J., concur.

82 - 26736

NELS E. JOHNSON,
Plaintiff in Error,

vs.

ENTERPRISE PLUMBING SUPPLY CO., a Corporation, and ANTON J. CERNAK, Bailiff of the Municipal Court of Chicago,
Defendants in Error.

ERROR TO CIRCUIT COURT OF COOK COUNTY.

224 I.A. 663

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the complainant from a decree which dissolved a temporary injunction theretofore issued, allowed the defendant damages for the wrongful issue thereof, and dismissed the bill for want of equity. The matter was heard by the chancellor upon exceptions to the report of a master, to whom the cause had theretofore been referred.

The bill of complaint alleged that on July 14, 1915, Sarah B. Eckhart was the owner of certain real estate, and on that date made a deed conveying the same to Charlotte Merkel who, with her husband, on May 31, 1917, conveyed the same to complainant and Nellie Johnson; that on July 28, 1917, a judgment was rendered in the Municipal court of Chicago in favor of the Enterprise Plumbing Supply Co., a corporation, and against said Sarah B. Eckhart et al.; that on July 31, 1917, a transcript of this judgment was filed in the Recorder's office of Cook County, and that by virtue thereof a levy was made on said real estate by the bailiff of the Municipal court, and said real estate advertised to be sold on October 1, 1917; that the complainant had demanded that the Plumbing Company release the lien of the judgment and the levy, which it refused to do; that Sarah B. Eckhart and Edgar M. Eckhart, her husband, have no interest in the real estate; that the complainant and Nellie Johnson are the sole owners, and purchased the same in good faith from Charlotte Merkel; that said Sarah and Edgarhave no interest

in said real estate and had none when the execution was levied; that said judgment and levy are clouds upon the title of the complainant and should be vacated and set aside; for which, together with an injunction and general relief, the bill prayed.

Defendant answered that the conveyance from Sarah B. Eckhart and Charlotte Merkel was without consideration for the purpose of hindering and delaying the Plumbing Company in the collection of its debts, and that the deed to Merkel did not represent a bona fide transfer.

The Master took the evidence and reported the facts to be that Sarah B. Eckhart was the owner of the premises described July 14, 1915; that the Plumbing Company obtained judgment in the Municipal court against her on July 23, 1917, in a case of the fourth class, and that a levy was made on said premises July 31, 1917; that Sarah B. Eckhart and her husband conveyed the premises to Charlotte Merkel for a consideration expressed in the deed of $10; that the deed was recorded March 7, 1916; that on the same day that the deed to Charlotte was made, viz, July 15, 1915, Charlotte Merkel and her husband made a deed reconveying the premises back to the Eckharts; that said last named deed, however, was not recorded; that, as a matter of fact, Charlotte Merkel had no knowledge that the Eckharts had made a deed of the property to her; that she paid nothing for it, never exercised any ownership over it nor collected rents from it; that on April 23, 1917, Charlotte Merkel made a contract of sale with the complainant whereby she agreed to convey the premises to him, and that in pursuance of that contract she, on May 31, 1917, by warranty deed conveyed said premises to the complainant and received certain cash checks and other real estate from him in payment thereof; that Charlotte Merkel held the premises in secret trust for the judgment debtor; that the complainant had knowledge and notice of the judgment in favor of the Enter-

prise Plumbing Supply Company and the levy thereunder long prior to the payment of the purchase price and exchange of deeds to the properties; that complainant took the deed under an assurance that he would be protected against any liens; that he had full knowledge of the lien of the Plumbing Company, and also had notice of the situation and condition of the title to the property, and that he took it upon a guaranty that he would be held harmless; that the complainant, as purchaser, took title to himself and wife, as joint tenants, by a deed delivered in August, 1917, and that neither the complainant nor his wife were innocent purchasers of the premises in question, but took title subject to the judgment of the Enterprise Plumbing Supply Co., and that the same was a valid lien on the premises.

The facts as found by the Master are not disputed by the appellant, but he contends that the court erred in concluding therefrom that the complainant took title subject to the judgment of the Plumbing Company, and in concluding that the judgment was a valid lien on the premises. In support of this contention he relies on Union National Bank v. Lane, 177 Ill., 171; Lyons v. Robbins, 46 Ill., 276; Rapplejo v. International Bank, 93 Ill., 396; Davidson v. Burke, 143 Ill., 139. These cases state the general proposition of law that a judgment is not a lien on real estate which the judgment creditor has conveyed for the purpose of defrauding creditors, and that a reconveyance by such a grantee to an innocent purchaser for value will pass a good title.

This is the undoubted rule of law, but not, we think, applicable here, for in this case the Master found, the Chancellor approved the finding (and we think the evidence sustained it) that the complainant was not and is not an innocent holder for value, for the reason that he had such notice prior to the completion of his purchase as to preclude his standing in that position.

"To constitute one a bona fide purchaser from the fraudulent grantee, he must have purchased the property for a valuable consideration, and, except where he purchases from a bona fide grantee without notice, actual or constructive of the fraud, must be innocent of any purpose to further a fraud, even to protect himself. While actual notice of a fraud makes one a purchaser mala fides, it is not necessary that he should have actual notice or positive and legal proof of the fraud, but it is sufficient if he has constructive notice, as when he has knowledge of circumstances such as would put a prudent man upon inquiry, and if prosecuted diligently would expose a fraud." 20 Cyc. 643.

The authorities in Illinois sustain this view and further hold that where a purchaser from a fraudulent grantee claims title, the burden is on such purchaser to show that he purchased in good faith and without notice of the fraud. Roseman v. Miller, 84 Ill. 299; Brown v. Welch, 18 Ill. 348; Lyon v. Moore, 250 Ill. 23.

Moreover, in this case the judgment debtor was in possession and possession is prima facie evidence of ownership, and notice of a fee simple title equal to the recording of the same. McVay v. McQuality, 97 Ill., 99; Santee v. Day, 111 Ill. App. 495; Morrison v. Morrison, 140 Ill., 560; Carr v. Brennan, 166 Ill., 108. We think, therefore, that the interest of Sarah B. Eckhart was subject to the lien and the judgment, and that the complainant took subject to that lien. Lyon v. Moore, supra.

But for another reason also we think it must be held that the complainant's title acquired under the deed from Charlotte Merkel was subject to the lien of this judgment. The execution was levied on the premises on July 31, 1917, and on the same day a certificate of th levy was filed in the Recorder's office, as required by the statute which then existed. By virtue of the provisions of section 63 of the Municipal Court Act, Hurd's Rev. Stat. 1916, p. 956, the judgment creditor thereby obtained a lien on these premises, of which complainant was bound to take notice. The levy was made nine days prior to the date of the deed from Merkel to complainant. By special statutory provision, therefore, the recording of this certificate of levy amount ed to notice to subsequent purchasers, and in this respect the facts

"To substitute the a Sons file petitioner from the Bankruptcy proceeding, he must have proceeded to successfully bar a meaningful transaction, and, doubtful which he petitioner from a Sons file proceed without motive, without to demonstrate of its intent, must be located at the address he further a trust, and to prove that Sons. While actual motive ad a fraud issue can a proceed only file, it is not necessary that to effects their actual motive or position was least great at the time, but it is motive alone if be the constructive motive, or when to the creditors or circumstances such to notify the a problem has upon creditors. The if proceeded illegally could answer a fraud." 31 Ibid.

The authorities in Idaho's motion this view but refused hold that where a preference from a fraudulent proceed filed title, the trustee is no such requirement is also that he petitioner in and fairly has without motive or the fraud. Bankman v. Miller, 64 Ill. App. Sons v. Fuller, 34 Ill. App. Sons v. Jones, 88 Ill. App.

However, in this case the Bankruptcy Court had to proceed motive and possession in order fraud evidence of insolvency, not motive of a the single file equal to the transfer of the sons. Miller v. The Bankrupt, 97 Ill., 99; Bankman v. Jay, 111 Ill. App. 464; Bankman v. Bankman, 140 Ill., 340; Hart v. Simmons, 148 Ill., 148. To prove, however, that the Internal of Sons a. Company was motive to the file and the petitioner, not this the constructive with motive to file file. Jones v. Miller, supra.

But for motive reason also to file it must be held that the petitioner's file required motive the file from Bankruptcy proceed was subject to the file of this petitioner. The motive was lapsed on the problem on July 21, 2012, not to the Jones for a notification of to day the file to the creditor's file, is required by the motive motive file motive. By virtue of the provisions of section 24 of the Bankruptcy Act but, that's the. Ibid. Ibid. 2, 3(b), the petitioner creditor Company obtained a lien on their property, of which creditor was not bound to file motive. The they was made upon file petition to the date of the filed from notice to petitioner. By virtue provisions, therefore, the recording of this motivation of large amount of be motive to motive proceed motive file.

of this case bring it within the rule announced in Teague v. Frank, 263 Ill., 500, and the cases there cited. This case is cited by appellant in his brief, but when read understandingly is against his contention.

The decree dismissing complainant's bill was proper and it is affirmed.

AFFIRMED.

Dever, P. J., and McSurely, J., concur.

107 - 26763

UNITY MANUFACTURING CO.,
a Corporation,
Appellee,

vs.

SIMPLEX CORPORATION,
a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

224 I.A. 663

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The appellee was plaintiff below, and filed a statement of claim in which it alleged that about March 12, 1920, defendant ordered from plaintiff 10,000 complete gear studs at the agreed price of 49 cents each; that plaintiff completed and delivered to defendant certain of these studs, for which there was a balance due of $935.92, and it had on hand 645 sets of completed gear studs which defendant refused to accept and for which plaintiff claimed an additional amount due of $316.05; further, that there was due on account of work in process an additional sum of $839.32.

Defendant filed an affidavit of merits in which it admitted the making of the contract and alleged that defendant delivered plans and specifictions, etc., setting forth the dimensions and measurements whereby the studs should be made; that certain quantities of said studs were delivered and accepted without examination, and $200 paid on account; that upon examination some were found not to be according to plans and specifications; that it had never refused to accept the gear studs and never directed plaintiff to cease work on its order, but was always anxious to have its goods manufactured and delivered according to the order.

The cause was tried by the court without a jury, and the court found the issues for the plaintiff and assessed the damages at the sum of $2,091.39, for which amount it entered judgment.

The evidence for plaintiff tended to show a written

order for 10,000 two-piece Ford gear studs exactly like blue print attached, to be made of cold rolled screw stock and finished like sample; that the order was taken by one Hapeman, who acted as manufacturer's agent; that a blue print was brought to plaintiff by Hapeman, and that plaintiff thereupon proceeded with the order; that certain changes in the blue print were made by direction of Hapeman and samples of the completed parts were sent to defendant; that a day or two thereafter Mr. Hapeman came in with one Tauscher from the defendant company, delivered another blue print, and other changes were made in the drawings, all of which were submitted to Tauscher, and that Tauscher then told the president of the plaintiff corporation "this was what they wanted."

Defendant's testimony was to the effect that Tauscher was without authority to make these changes, and thus was raised the principal question of fact in the case. We have examined the evidence and think the court was justified in concluding that Tauscher did have such authority. This appears not only from the positive testimony of plaintiff's witnesses, but we think must be fairly inferred from all the evidence.

The law applicable to the transaction is set forth in the Uniform Sales Act, Hurd's Rev. Stat. 1919, chap.121a.

Appellant says that the studs were to be manufactured for a particular purpose, made known by the buyer to the manufacturer, and that there was therefore an implied warranty that the same would be reasonably fit for the purpose intended. Madson v. Cordell, 188 Ill. App. 564; Telluride v. Crane Co., 208 Ill. 227, are cited. While these cases were decided prior to the enactment of the Uniform Sales Act, we do not think the rules therein laid down are in conflict with that law. Paragraph 1 of section 15 of the Uniform Sales Act states substantially the same rule, but we do not think that rule

order for 16,000 two-piece feet your state monitor this fill point without, is be made of with yields never which not financial life member that the weekend when by one Thousand the under as manufacturers street; then a this total was should is already by Thomas, and that practice training pressure this the taken; any effects change in the time point more each by standing of Canada and months of the employee parts view most be [illegible] day or the essentially to. Thomas week in this are Theodore from the different company, different another time right, and every change was made in the business, all of which size monitoring is Theodore, and that therefore time that the operations of the plaintiff incorporation "this was that they would.*

Defendant's testimony was to the effect that Theodore was without authority to make these changes, and that the raised the principal question of fact in the case. To have conducted its business and CHAD the years the practice is continuing, that freedom did have much authority. This inquiry not only from the positive testimony of plaintiff's witnesses, but we think must be fairly inferred from all the evidence.

The law applicable to the transaction is set forth in the Uniform Sales Act, Rank's ann. Stat. 1918, Sec. [illegible].

Appellant says that the trial court was in contemplation for a particular purpose, that there by its buyer to the manufacturer and that there was intention or implied warranty that the item would be reasonably fit for the purpose intended. Dunlop v. Dunlop, 141 Ill. App. 688; Kniskern v. James Co., 204 Ill. 157, was cited. While these cases were decided prior to the enactment of the Uniform Sales Act, we do not think the rule therein laid down is inconsistent with that law. Paragraph 2 of section 12 of the Uniform Sales Act states substantially the same rule, but it is not claim that this

is applicable where specific goods are manufactured according to plans and specifications submitted to the manufacturer by the buyer, if the goods are in fact made according to these plans and specifications. The evidence here does not indicate defects in the materials out of which the article was to be manufactured nor in the workmanship, for both of which the manufacturer would be responsible.

The manufacturer is not responsible for defects in the goods resulting from following plans and specifications in making which the buyer relied on his own judgment. American Spiral Pipe Works v. Universal Oil Products Co., 220 Ill. App. 380.

Moreover, if we assume the breach of warranty, the remedies of a buyer for such a breach are also set forth in the Uniform Sales Act, supra, section 69, and defendant has introduced no evidence tending to show a defense within the provisions of that section.

We think the court was justified in finding against defendant on all the items, and the judgment is affirmed.

AFFIRMED.

Dever, P. J., and McSurely, J., concur.

In exploiting these consists goods are manufactured according to plans and specifications furnished to the manufacturer by the buyer, if the goods are in fact made according to these plans and specifications. The evidence does not indicate advice to the satisfaction of which the goods must be manufactured was in the possession, or the responsibility. For both of which the manufacturer would be responsible.

The manufacturer is not responsible for defects in the goods resulting from faulty plans and specifications to which the buyer relied on his own judgment. Jennings Indust Trucks v. National Oil Products Co., 000 U.S. 000, 000.

However, if the defect for which a strike was made was known to the manufacturer or a buyer for such a strike was also the fact in the Bailey Dike Co., Plaintiff, vs. Defendant, and defendant had introduced no evidence tending to show a defense claim the plaintiff is that evidence.

The trial the court was justified in finding against defendant on all the facts, and the judgment is affirmed.

AFFIRMED.

Davis, P. J., and Dalgarnie, J., concur.

127 - 26784

MARIE D. DWYER,
Appellee,

vs.

ETTA L. DWYER, Administratrix
of the estate of JAMES M. DWYER,
deceased,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

224 I.A. 663

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In this case Mary D. Dwyer filed a bill of complaint and made defendants thereto Etta L. Dwyer, administratrix of the estate of James M. Dwyer, deceased, and the Continental & Commercial Trust & Savings Bank. The bank filed an answer, the administratrix filed a general demurrer which was overruled, and the administratrix electing to stand by her demurrer, the court ordered that the bill as to her should be taken as confessed, and a decree was entered in accordance with the prayer of the bill.

The facts as set up in the bill and found by the decree are that the complainant is a resident of the City of Chicago, in Cook County, and a cousin of one James M. Dwyer, deceased, who lived with the complainant and her mother as a member of their family continuously for over twenty-five years next prior to the time of his decease, which took place on January 22, 1920; that James M. Dwyer in his lifetime opened a savings account in his own name with the Hibernian Banking Association, a corporation; that thereafter he decided to change said account for the purpose of making the complainant the sole owner of the money so on deposit, in case of his death before the death of the complainant; that in pursuance of said intention, on July 24, 1916, he caused said account to be changed from an individual account in his own name into a joint or co-partnership account in his name and the name

88. JUDGES MATCHETT DISMISSED THE DEFENDS OF THE BANK.

In this case Mary C. Dwyer filed a bill of [illegible] and made defendants thereto Julia A. Dwyer, administratrix of the estate of James M. Dwyer, deceased, and the Continental Commercial Trust & Savings Bank. The bank filed an answer, the administratrix filed a general demurrer which was overruled, and the administratrix elected to abide by her demurrer. The court entered that the bill as to her should be dismissed, and a decree was entered by stipulation with the private of the bill.

The facts as set up in the bill and found by the decree are that the complainant is a resident of the City of Chicago, in Cook County, and a cousin of one James M. Dwyer, deceased, who lived with the complainant and her mother as a member of their family continuously for more than twenty-five years prior to the time of his decease, which took place on January 22, 1898; that James M. Dwyer in his lifetime formed a savings account in his own name with the Continental Trust & Savings Bank, a corporation; that thereafter he decided to change said account for the purpose of making the complainant the sole owner of the money on his account, in case of his death before the death of the complainant that in pursuance of said intention, on July [illegible], 1897, he caused [illegible] to be changed from an individual account in his own name into

of complainant or the surviver of them; that at that time he entered into a certain joint contract with the complainant to that effect; that in pursuance of that agreement, which was under seal, complainant furnished to the bank her signature, and gave the officials information as to her residence, occupation, place and date of birth, and the name of her father and mother, and further facts necessary for her identification with reference to said account; that thereafter the Hibernian Banking Association consolidated with the defendant bank, and that said James M. Dwyer to the time of his death made repeated deposits in and withdrawals from said account, using the pass-book furnished by the bank for that purpose, and that on the day of his death and at the date of filing the bill of complaint there was a deposit with the defendant bank in said account of the sum of $1,291.34, bearing interest at three per cent per annum, from January 1, 1920; that by reason of these facts the said Dwyer on the 24th day of July, 1916, made a gift to complainant of said account in said bank, subject only to his use thereof during his lifetime, and that upon the death of said James M. Dwyer, on January 22, 1920, said account became the absolute and sole property of said complainant; that on January 30, 1920, the defendant, Etta L. Dwyer, was duly appointed by the Probate Court of Cook County, as administratrix of the estate, and that the administratrix upon her appointment took possession of the pass-book evidencing said account; that complainant has since demanded the return of the pass-book, but that the administratrix refuses to surrender possession thereof to the complainant, and on the contrary has made a demand on the defendant bank for the payment to her as such administratrix of the balance of said savings account, and that said defendant bank will not pay said moneys to the complainant except upon order of the administratrix accompanied by the pr oduction

of said pass-book. The decree finds that the administratrix has no right, title or interest in the account or the interest which has accrued thereon, and that the defendant bank holds the same solely for and on behalf of the complainant, and orders and adjudges and decrees that the complainant be declared to be the sole and absolute owner of the entire fund free and clear from the rights and claims of any and all persons whatsoever; that the defendant Bank be directed to pay the same to her or to her order, and that the administratrix be perpetually enjoined from claiming or asserting any claim or demand against the said moneys, and that she deliver up forthwith to the complainant the original pass-book, evidencing said savings account, and that costs should be taxed against the administratrix.

It is the contention of the defendant administratrix, who appeals, that a bill in equity will not lie because upon the facts as stated the complainant has an adequate remedy at law. She says that stripped of surplusage, this is an action for the recovery of a certain definite sum of money with interest; that replevin or assumpsit would lie therefor, and that there is no justification for the interposition of a court of equity, nor facts which would give it jurisdiction, citing Thurber Art Galleries v. Rienzi Garage et al., 298 Ill. 35; Day v. Bullen 127 Ill. App., 155; Gaines v. Miller, 111 U. S. 395; Dinsmoor v. Brassler, 164 Ill. 211; Brauer v. Laughlin, 235 Ill. 265.

Appellant cites authorities to show that this question was properly raised by the demurrer, and this contention must, we think, be conceded as also the general rule of law for which she contends. But appellant does not state the exceptions to the rule, for which there is abundant authority, that although there may be a remedy at law, nevertheless, where a multiplicity of suits and circuity of action may be avoided, or where the remedy at law is not so complete and sufficient as the remedy in equity, a court of chancery will take jurisdiction. Pease et al. v.

also

Supreme Assembly et al., 176 Mass. 506; People v. Bordeaux, 242 Ill. 327.

We think also, as appellee contends, that on the facts here presented the appellant was a constructive trustee of the fund for the appellee, who, as a beneficiary, would have a right to resort to a court of equity in order to obtain the subject matter of the trust. 1 Pom. Eq. Juris. (4th Edition) Sec. 155; Clews v. Jamieson, 182 U. S. 461; People v. Bordeaux, supra; Smith v. Bates Machine Co., 182 Ill. 166.

For the reasons indicated the decree of the Superior Court is affirmed.

AFFIRMED.

Dever, P. J., and McSurely, J., concur.

Gutman Manufacturing et al., 171 Misc. 904; Ranger v. Thielemann, 144 App. Div. 477.

In these cases, on appellate review, that on the evidence presented the appellants was a monetary interest of the kind for the appellee, who, on a hypothetical, would have a right to expect to a result of equity in order to the relative amount of the issue. I Jac. Ex. Prac. (2d revised ed.) 1179. Cline v. Jenkins, 140 N. Y. 181; Jewell v. Brighton Mining v. Pike Mining Co., 124 App. Div. 117.

For the reasons indicated the decree of the Surrogate Court is affirmed.

Decree affirmed.

Hence, P. J., J., not concur, J., concur.

190 - 26850

E. EARL PIERCE, executor
of the estate of
ANDREW P. CALLAHAN,
deceased,
Appellee,

vs.

T. H. FLOOD & COMPANY,
an Illinois corporation,
et al.,
Appellants.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

224 I.A. 664

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The defendants in this case appeal from a judgment rendered in favor of the plaintiff in the sum of $12,289.25. The action was based upon two promissory notes, one for the sum of $7,900 dated Chicago, Illinois, June 5, 1919, due four months after date, to the order of the Continental & Commercial National Bank of Chicago, with interest at the rate of seven per cent per annum after maturity until paid, and the other note dated July 7, 1919, due 60 days after date, to the order of the Continental & Commercial National Bank for the sum of $4,500, with like interest at maturity. Each of these notes is signed, T. H. Flood & Co. by L. J. Flood, Treasurer, and each of them purports to be guaranteed by L. J. Flood and Susan Flood by her attorney in fact, and are endorsed without recourse by the Continental & Commercial National Bank of Chicago, to which the notes were, by their terms, payable. A copy of each of the notes was attached to the declaration, and the maker and the guarantors were made defendants to the action. They entered their appearance and filed a plea of the general issue. The cause was submitted to a jury. The notes were offered in evidence, and the plaintiff testified that he had computed the amount due upon both of them. At the conclusion of the evidence,

the defendants requested an instruction in writing in their favor, jointly and separately, but said motions were overruled, and the defendants then called plaintiff as a witness.

Plaintiff testified that he believed that he was the owner of the notes, and was then asked questions with reference to the consideration which he had paid for them. Objections to questions along this line were sustained, as were other objections to questions as to whether the Continental & Commercial National Bank of Chicago was still the owner of these notes, and whether the bank had sued plaintiff as executor because of the notes, or had filed a claim against the estate of which plaintiff is executor, based on these notes. At the conclusion of this evidence, the court, on motion of the plaintiff, instructed the jury to find the issues for the plaintiff. The giving of this instruction, and the rulings of the court refusing to receive the evidence offered, are the alleged errors argued. Appellants say there was no proof of the authority to execute the notes or the assignments of the same.

Section 52 of the Practice Act, Jones & Addington's Statutes, Vol. 5, par. 8589, provides in substances, that no person shall be permitted to deny on trial the execution or assignment of any instrument in writing, whether sealed or not, upon which any action may have been brought, or which shall be pleaded or set up by way of defense, or offset, or is admissible under the pleadings, when a copy is filed, unless the person so denying the same, shall, if defendant, verify his plea by affidavit. This section of the statute has been construed in the City of Chicago v. Peck, 196 Ill. 260, and it was there held that where an instrument purports to be executed by an agent, the authority of the agent is a material part of the execution, and that to admit the execution is to admit all the essentials of the execution.

the defendants requested an instruction in writing in similar
[illegible]ner, jointly and separately, but said writing was refused,
and the defendants then called plaintiff as a witness.

Plaintiff testified that he believed that he was
the owner of the notes, and was then asked questions with
reference to the negotiations which he had held for them.
Objections to questions about this line were sustained, as
were other objections to questions as to whether the Commercial
Commercial National Bank of Illinois was still the owner of
these notes, and whether the bank had used plaintiff's endorsement
because of the notes, or had filed a claim against the estate of
which plaintiff is executor, based on these notes. At the
conclusion of this evidence, the court, on motions of the defen-
dant, instructed the jury to find the issues for the plaintiff.
The giving of this instruction, and the rulings of the court
sustaining to receive the evidence offered, are the alleged errors
complained. Defendants say there was no proof of the authority to
execute the notes or the consideration of the same.

Section 52 of the Practice Act, Jones & Addison's
Statutes, Vol. 8, par. 8388, provides in substance, that no
witness shall be permitted to deny or limit the execution or
delivery of any instrument in writing, whether sealed or not,
upon which any action may have been brought, in which shall be
included or set up by way of defense, or offset, or in mitigation
after the pleadings, when a copy is filed, unless the person so
denying the same, shall, if informed, verify his plea by
affidavit. This section of the statute has been construed in
Chicago City of Chicago v. Funk, 126 Ill. 380, and it was there
held that where an instrument purports to be executed by an
agent, the authority of the agent is a matter of fact of the
execution, and that to shift the burden is to admit all the

It was not error therefore to refuse to admit the evidence offered by defendants, because there was no appropriate plea under which it was admissible. This case is not unlike that of Callahan & Co. v. Flood & Co. et al., 221 Ill. App. 641. In that case it appeared, as we think it appears here, that the appeal to this court was taken solely for the purpose of delay, and here, as there, the judgment will be affirmed, with statutory damages in the sum of $250 for bringing the appeal to this court for that purpose.

AFFIRMED WITH STATUTORY DAMAGES.

Dever, P. J., and McSurely, J., concur.

26887

287 - 26887

RANSOM N. KALAMS, Administrator of the estate of LOUIS KITKINVICZ, Deceased,

Appellee,

vs.

CITY OF CHICAGO,

Appellant.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

224 I.A. 664

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In this case the plaintiff administrator sued the defendant in an action on the case for alleged negligence which caused the death of plaintiff's intestate. The negligence alleged in the declaration was that the defendant, City of Chicago, permitted a public street, North avenue, at a point "about seventy feet west of the intersection of the same with Leavitt street" to be and remain in a dangerous and unsafe condition, and carelessly and negligently permitted and allowed divers holes, depressions and uneven places to be and remain therein; that the defendant had, or in the exercise of due care would have had, notice thereof; that plaintiff's intestate was on July 7, 1918, riding on a bicycle on said highway and in the exercise of due care; that the bicycle was run and precipitated into one of the holes, and that plaintiff's intestate thereby received injuries from which he afterwards died. Defendant filed a plea of the general issue and the cause was submitted to a jury. At the conclusion of the evidence defendant made a motion to instruct the jury in its behalf, which was denied, the jury returned a verdict for plaintiff in the sum of $2500, and defendant's motion for a new trial and in arrest of judgment being overruled, judgment was entered on the verdict for that amount.

The only matter argued here is defendant's contention that the evidence shows deceased to have been guilty of contributory negligence which precludes recovery by his administrator. Defendant says

it is apparent that the deceased either did not notice the condition of the street, or that if he did notice it must have deliberately taken a chance in attempting to pass over it in the manner in which he did; but defendant says, in either case plaintiff's intestate was clearly guilty of contributory negligence. No evidence was offered on behalf of the defendant, and this argument is based on the evidence submitted in plaintiff's behalf.

Ordinarily the question of contributory negligence is for the jury. Of course it is otherwise if the facts are such that all reasonable persons would agree that the deceased was negligent. This question it is our duty to consider as a question of law, and we have cast upon us by statute the further duty of determining whether the verdict of the jury, which amounts to a finding that the deceased was not guilty of contributory negligence, is against the manifest preponderance of the evidence.

That defendant was clearly guilty of negligence is established by a clear preponderance of the evidence, and it is not argued here to the contrary. Nor is the evidence, although somewhat meagre, in any way conflicting. This evidence tended to show that the accident occurred at about 3 p. m. on July 7, 1910. The intestate was at that time riding a bicycle which had been purchased only the day before and which had a motor attachment. He was moving in an easterly direction along the south side of North avenue, a public highway, which extends east and west, near to the intersection of that street with Leavitt street, which extends north and south. He was travelling at a speed of about eight miles an hour. As he neared Leavitt street, and apparently when about to turn the bicycle towards that street, it ran into a hole or depression in the pavement and he was thrown, receiving injuries from which he died the following day. The hole was about two feet south of the car tracks which were laid in North avenue. It was about three

feet long, eighteen to twenty inches wide, and five or six inches in depth. It had been formed gradually by the wear of vehicles as they passed over the pavement of the street, which was of asphalt. This was originally, apparently, a weak spot. The remainder of the pavement was in good condition. It was a clear day and the pavement was dry. The hole or depression could be seen from the stores which were on the south side of the street opposite to it. Plaintiff had not been over this part of the road before, and the evidence shows that this hole had been the cause of several accidents to other persons at other times. A photograph of it is in evidence.

The deceased was a married man thirty-three years of age and in good health. His hearing and eyesight appeared to be good, but he wore glasses. He worked as a laborer in a stock room and earned $16 a week.

These, we think, are substantially the material facts as they appear in the evidence. Many cases have been cited by both parties, and the conclusion to be gathered from all of them is that each case must depend upon the particular circumstances which are made to appear. The cases, however, we think, do establish the proposition of law that a party walking or riding upon a public street has a right to presume, in the absence of knowledge to the contrary, that the street is in a reasonably safe condition. City of Chicago v. Babcock, 143 Ill. 358; Campbell v. City of Chicago, 100 Ill. App. 358.

There were, we think, facts in evidence from which the jury might have inferred that the deceased was in the exercise of due care. We think it may be fairly inferred from the evidence that the deceased did not see the hole, or at least if he did, that from his position on the bicycle he did not appreciate its dangerous character. The fact that other accidents had happened

there to other people who drove into this hole is, we think, some evidence from which a jury might reasonably infer that one travelling on this pavement might, in the exercise of due care, drive into it.

This was, so far as the evidence shows, the deceased's first journey over this pavement at this particular place, and it was his first attempt to ride this particular bicycle with the motor attachment. The jury may have properly inferred that deceased's attention was necessarily attracted to these and away from the pavement. Further, he was about to turn a corner where it would be necessary, in the exercise of care, that he should be on the lookout to avoid collision with other persons lawfully upon the streets. He was not riding at a dangerous rate of speed. While it is a close question and the evidence not so full and complete as to all the circumstances as we would desire, we think the plaintiff made out a prima facie case of due care, and in the absence of any evidence by the defendant tending to show the contrary, we are not disposed to interfere with the verdict of the jury.

The judgment is therefore affirmed.

AFFIRMED.

Dever, P. J., and McSurely, J., concur.

254 - 26915

SAM ROSENBERG,
Appellee,

vs.

HERMAN KLEINBOGEN, doing business as H. KLEINBOGEN & COMPANY,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant below from an order of the Municipal Court denying defendant's motion to set aside an order of the court theretofore entered, granting a non-suit to the plaintiff.

Appeals to this court are controlled by statute, and lie only from final orders, judgments and decrees. In Peabody Coal Co. v. Industrial Commission, 287 Ill. 407, the Supreme Court says:

> "A judgment or decree is final and appealable only when it terminates the litigation between the parties on the merits of the case, so that when affirmed the court below has only to proceed with the execution of the judgment or decree."

The order appealed from is not of this kind, and the appeal is therefore dismissed.

APPEAL DISMISSED.

Dever, P. J., and McSurely, J., concur.

96 - 27046

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

JOHN FELICE, MRS. JOHN FELICE and LEO MENARD,
Plaintiffs in Error.

ERROR TO
CRIMINAL COURT,
COOK COUNTY.

224 I.A. 664

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In this case the plaintiffs in error John Felice, Mrs. John Felice and Leo Menard, were indicted jointly with one Frank F. Mulrenin on the charge of the larceny of two trunks of the value of $50 each, and merchandise therein of the value of $1,400, the same being the property of Carrie F. Hayden. The second count of the indictment charged these defendants with receiving the stolen property knowing it to be stolen. Plaintiffs in error were given a separate trial from Mulrenin, who testified for the State. The jury brought in a verdict finding plaintiffs in error guilty under the second count and fixing the value of the property at $14. Judgment and sentence against John Felice and Leo Menard were entered against them separately, and no judgment was entered on the verdict against Mrs. Felice. For that reason she cannot prosecute this writ of error, and it must, as to her, be dismissed.

The evidence tended to show that the trunks in question were stolen from the Union Station in Chicago, January 4, 1921. A police officer testified that January 16th thereafter, he saw one of these trunks at the home of John Felice, 1007 South Jefferson street. John Felice was taken to the police station and the trunk showed to him. He told the officer that his wife had bought the trunk from a pedlar who had come to

their place. The officer searched the house, but did not find any of the contents of the trunk. John Felice, the evidence tends to show, was in the express business at the Union depot at the time of the theft. Mrs. Felice says that she bought the trunk from a rag pedlar for $3.50. Mulrenin testified that on January 4, 1921, he met Menard at Clinton and Adams streets; that Menard was then driving a truck, which had broken down; that he had two trunks on his truck, one of which was a Mayden trunk; that Menard asked witness if he would haul the trunks to 1007 Jefferson street and deliver them to Mrs. Felice, and ask her for $25 for excess baggage. Mulrenin says that he delivered the trunks to Mrs. Felice, collected the $25, and drove back to the depot; that he took no receipt from her for the property or money. When questioned by the police both Mr. and Mrs. Felice stated that she had bought the trunk from a pedlar, and on cross-examination he, John Felice, said that he first saw the trunk when he came home and asked his wife about it; that he had not told her to buy the trunk, and did not know she was going to buy one; that the lock on the trunk was broken when he first saw it; and that his wife told him she had bought it from a rag pedlar. "I did not ask where she bought the trunk because it did not make any difference to me."

This is substantially all the evidence in the record tending to show any knowledge on the part of John Felice as to the stolen trunk. He was an express man, driving a horse and wagon, and earning $5 or $10 per day. He has five children and his wife runs a little grocery store. He has never before been charged with an offense. We do not think the evidence is sufficient to sustain the conviction as to him.

The verdict as to Menard is based for the most part on the testimony of Mulrenin, who, if his evidence is to be believed, was an accomplice with Menard in the theft of the trunk. As against Menard, the State offered, and the court,

over objection, received and permitted evidence to go to the jury, which, if true, tended to show that Menard had stolen another trunk belonging to one Taylor some eight months previous to the larceny of the Hayden trunk. The trunk supposed to be stolen was offered in evidence and received over the objection of defendant Menard. Mrs. Mulrenin was permitted to testify that Menard delivered this trunk to her, and the evidence of Taylor so received tended to show that it had been stolen from him. These two transactions are wholly independent of each other, and the rule applicable is elementary. Evidence of a distinct substantive offense cannot be admitted in support of another offense. Farris v. People, 129 Ill. 528; Jansen v. People, 159 Ill. 440; Bishop v. People, 194 Ill. 365. There are, of course, exceptions to this rule, but there are no facts in the record which makes any exception applicable.

For the reasons indicated, as to Mrs. John Felice the writ will be dismissed; the judgment as to John Felice will be reversed; and the judgment against Leo Menard will be reversed, and the cause as to him remanded for another trial.

DISMISSED AS TO MRS. JOHN FELICE; REVERSED AS TO JOHN FELICE; REVERSED AND REMANDED AS TO LEO MENARD.

Dever, P. J., and McSurely, J., concur.

over objection, received and permitted evidence to go to the jury, which, if true, tended to show that Durand had stolen another trunk belonging to our Taylor from which another precious to the Jacobsy of the Hughes trunk. The trunk mentioned as the stolen was offered in evidence and received over the objections of defendant Durand. Mrs. Sullivan was permitted to testify that Durand delivered this trunk to her, and the evidence of Taylor as received tended to show that it had been stolen from him. These two transactions are clearly independent of each other, and the rule applicable is elementary. Evidence of a distinct substantive offense cannot be admitted in support of another offense. Turner v. People, 176 Ill. 228; Lucas v. People, 176 Ill. 402; Hinton v. People, 124 Ill. 548. These are, of course, exceptions to this rule, but there are no facts in the record which make any exception applicable.

For the reasons indicated, we hold the judgment of the trial court should be reversed; and the judgment against Durand will be reversed, and the cause be then remanded for another trial.

DISMISSED AS TO WOOD. DOUBLE FELONY; REVERSED AS TO JOHN FELICE; REVERSED AND REMANDED AS TO LEO BLANCHARD.

Hewes, P. J., and Matchett, J., concur.

27045

95 - 27045

CHARLES F. OGREN,
Defendant in Error,

vs.

JACOB LEVY,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

224 I.A. 665

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The record in this case shows that defendant in error on May 1, 1920, filed a complaint of forcible detainer against the defendant below, who is plaintiff in error here, to recover possession of certain premises; that summons was served, and that plaintiff in error entered his appearance; that May 18, 1920, a verdict was returned finding the right of possession in plaintiff and that defendant was unlawfully withholding the premises from plaintiff; that motions for a new trial and in arrest were over-ruled and judgment entered on the verdict; that an appeal from this judgment was prayed and perfected by plaintiff in error; that June 13, 1921, the judgment was affirmed by this court.

June 30, 1921, plaintiff in error filed a petition in the Municipal court, in which he set up the foregoing facts and, further,

"that since said judgment in the Municipal court, said Charles F. Ogren has accepted rental of your petitioner for the premises attempted to be taken by said plaintiff, for the months intervening since said judgment in said Municipal court, and that by so taking said rent, said plaintiff abandoned his said judgment for possession of said premises, and said judgment has become defunct and discharged *****; that said plaintiff served said defendant in February, 1921, again with a sixty day notice to terminate said lease, and that on May 1st, 1921, said plaintiff commenced another suit for possession of the same premises occupied by the said defendant and recovered a judgment for possession therefor.

Your petitioner further represents that the petitioner prayed an appeal from said judgment in the Appellate Court of Illinois, First District; which said appeal was allowed on the filing of an appeal bond within five days from the date of the prayer for an appeal, and which said bond was so filed and approved by the court within the time therefor limited. Your petitioner therefore prays that an order be entered of record, setting forth said discharge

[illegible]

[illegible]

[illegible]

of said judgment, and that it be further ordered that no writ of restitution for possession of said premises be issued by the Clerk of the Court in said judgment."

The petition was duly verified on the same day it was filed. A hearing thereon was had, and an order entered denying the motion on the hearing. The only evidence offered was the verified petition.

We think the order dismissing the petition should not have been entered under the circumstances. The facts alleged in the petition, if true, entitled the petitioner to an order as prayed. Woodbury v. Ryel, 128 Ill. App., 460. The court should have ruled the plaintiff to answer the petition, and caused the matter to be tried out on the issue thus made. In cases arising upon a motion, the same mode of trial ought to prevail as at common law under the writ of audita querela; that an issue should be made and sent to a jury to be tried as any other issue of fact. Reid v. O'Brien, 86 Ill. App. 129; Harding v. Hawkins, 141 Ill. 572.

The judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

Dever, P. J., and McSurely, J., concur.

of such judgment, and that it be further ordered that no writ of execution for possession of said premises be issued by the clerk of the Court in such judgment."

The petition was duly verified on the same day it was filed. A hearing thereon was had, and at eight minutes to eight the motion to dismiss. The only witnesses offered was the special petition.

The trial was given disposing the petition which was hard been entered under the circumstances. The trial court in the problem, it said, entitles the petitioner to be other as prayed. Southern v. Hall, 139 Ill. 431, 440. The court should have ruled the plaintiff to answer the petition, and answer the motion to be taken out on the issue then made. In such situation upon a motion, the mere omission of trial would be proper in a person for under the writ of motion question; that an issue should be made and such is a jury to be taken as any other issue of fact. Hall v. Chicago, 98 Ill. 488, 491; Kingsley v. Kingsley, 143 Ill. 475.

The judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

Davis, P. J., and Dunnigan, J., concur.

380 - 27338

CHARLES F. OGREN,
Appellee,

vs.

JACOB LEVY,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

224 I.A. 665

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment in favor of the plaintiff in an action for forcible detainer. The cause was tried before a jury and the court instructed the jury to find the issues for the plaintiff.

As grounds for reversal it is urged that the court should have quashed the summons, but the point was waived when the defendant demanded trial by jury, which amounted to a general appearance.

It is urged that plaintiff failed to prove that defendant was in possession of the premises when the suit was started, but we have examined the record and find that the evidence does not sustain this contention.

It is urged that it was error to enter judgment when a former appeal was still pending, but this defense does not appear to have been raised upon the trial.

The appeal is without merit, and the judgment is affirmed.

AFFIRMED.

Dever, P. J., and McSurely, J., concur.

Term No. 13 Agenda No. 4

IN THE
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

OCTOBER TERM, A. D., 1921

MARY E. BOYER
Appellant.
vs.
ALICE SHANK, et al.
Appellees.

Appeal from
Lawrence.

Opinion by Higbee, P. J.

Appellant filed a bill to the February 1920 Term of the circuit court of Lawrence county, alleging that her father, Edward G. Conover died intestate December 21, 1889, leaving his widow, Esther Conover, the complainant, Mary E. Boyer, and the defendant, Alice Shank, as his only children and only heirs at law, and that at the time of his death said Edward G. Conover was the owner of a certain tract of 60 acres of land in said county; that from the death of said Edward G. Conover, his widow, Esther Conover, resided upon and received all the profits from said land until the time of her death on October 28, 1919; that the complainant with her husband, the defendant, Marion Boyer, soon after the death of said Edward G. Conover moved onto said land with the widow, Esther Conover, under a contract between Marion Boyer and Esther Conover, by which Marion Conover was to cultivate said lands and out of the proceeds thereof to feed and care for the live stock of the widow the same as he did his own. The bill further alleges that the said Esther Conover was 88 years of age at the time of her death and that she left no estate whatever, real or personal; that complainant had cared for and furnished her board for more than five years prior to her death, during which time she had been compelled to give her mother almost constant attention; that the care, attention, board and nursing which she had so bestowed on her mother was reasonably worth the sum of five thousand dollars, and that her sister, Alice Shank, is equally liable with complainant for the support of their mother.

The bill prayed for a partition of the lands between complainant and defendant, Alice Shank, and also that the court take an account of the amount due complainant for the care and attention given to her mother and order the same to be paid complainant out of the interest of said Alice Shank in said lands on the proceeds resulting from the sale thereof. The defendant, Alice Shank filed an answer to this bill practically admitting all the material allegations thereof except that portion concerning the care and support of Esther Conover by

complainant which was denied. The only other defendant was complainant's husband Marion Boyer, who was defaulted. The case was heard before the court upon a stipulation as to certain facts and the testimony of witnesses. The court entered a decree for partition of the land but denied the relief prayed by complainant for the support and attention bestowed on her mother. From that portion of the decree denying said relief the complainant has prosecuted this appeal.

From the stipulation and testimony of witnesses, the death of Edward Conover, his ownership of the land, the death of Esther Conover and the heirship clearly appears. It is also shown that the appellant resided with her father and mother until her father's death in 1889 and thereafter continued to reside with her mother until 1903 when she was married to the defendant, Marion Boyer; that after her marriage she and her husband continued to live with her mother and, as she testified, the relation of mother and daughter, in the same house never changed from the time of her father's death until her mother's death. There was proof to the effect that when appellant was married, her husband and her mother entered into a contract whereby the husband was to cultivate the land in question and feed and care for his own live stock and that of Esther Conover; and also some evidence introduced by appellant that her mother had stated to third parties she wanted appellant to have all her property at her death for taking care of her.

It is clear from the proof that complainant and her mother resided together as members of the same family. The doctrine is well established in this state that where a person resides with a relative as a member of his or her family, the law will presume that any services performed by such person were performed gratuitously, in the absence of proof of an express contract that such services were to be paid for or circumstances from which such a contract will be implied. Sherman v. Whiteside, 190 Ill. 576. In our opinion the evidence was not sufficient to establish a contract either express or implied, between appellant and her mother that appellant should be compensated for the care and attention she bestowed upon her mother. Under that view of the case this relief was properly denied by the chancellor. No administration appears to have been had upon the estate of either Edward G. Conover or Esther Conover, and therefore no claim had ever been allowed to complainant for her services. So that even though complainant was entitled, under the law, to pay for such services, the same were not such a lien against the defendant's interest in the lands as was proper for a court to consider and adjust in a partition suit. Such proceeding would deprive appellee of her right to a trial by jury. To support her contention that her claim for compensation for services rendered her mother can be determined in this suit, appellant relies to a large extent upon the case of Bangs v. Brown, 113 Ill. 80. That was a suit in partition brought by all the heirs of Sara Brown and John H. Brown except one, Clara H. Bangs, who with her husband was defendant. John Brown the husband predeceased his wife Sarah Brown by 27 years. Sarah Brown lived with Clara H. Bangs after the death of John Brown until she died. The bill prayed that Clara H. Bangs and her husband be required to account for rent on a certain portion of the premises upon which they resided. Clara H. Bangs filed a cross bill alleging that she

had boarded, cared for, supported and nursed her mother from the time of her father's death until her mother died and prayed that she be allowed a reasonable compensation therefor, and that the same be made a charge against the interest of the other heirs in and to the premises. The court found that the rent of the premises occupied by Clara H. Bangs and her husband was a fair compensation for the board and care of the mother and disallowed the claim for the same except as to the sum of $100.00 which was allowed for extra care during the sickness of the mother. From this decree Clara H. Bangs appealed. The only question in that case concerning the allowance of the claim was raised by the claimant herself and was not whether the claim was properly allowed in a partition suit but whether the amount allowed was sufficient. The Supreme Court affirmed the decree but did not pass upon the question whether such a claim was a proper matter of adjudication in a partition suit. The appellees were the only parties who could have raised that question and as they did not do so the same was not before the court.

Upon a full consideration of the facts in this case and the law applicable thereto, we are satisfied the decree in this case should be and it accordingly is affirmed.

Affirmed.

Not to be reported in full.

Term No. 14. Agenda No. 49

IN THE APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

October Term, A. D. 1921.

HERBERT J. BRADLEY, Administrator of the Estate of Emma Ruth Bradley, Deceased.
Appellee.

v.

WALKER D. HINES, Director General of Railroads,
Appellant.

Appeal from Perry

Opinion by Higbee, P. J.

Herbert J. Bradley and his wife, Emma Ruth Bradley, were driving a Ford automobile from their home at Makanda, Illinois, to DuQuoin on August 26, 1919. It was necessary for them to cross the railroad track of the Illinois Central Railroad at what is known as the White Ash Mine Crossing. At this crossing the public highway runs east and west and the railroad north and south. Bradley and his wife were traveling east on the highway. There are three railroad tracks at this crossing, the west one being known as the switch track, the next one to the east as the south bound track and the one farthest to the east as the north bound track. The switch track is about 31 feet west of the west rail of the north bound track, while the north bound and south bound tracks are about 8 feet apart. About 250 feet west of the crossing is a warning post bearing the letters "R. R." and some 26 feet west from the switch track is another warning post upon which is the word "Stop." After Bradley and his wife had crossed the switch track and the south bound track and while they were crossing the north bound track their automobile was struck by an engine coming with a caboose from the south. Emma Ruth Bradley was so severely injured that she died the evening of that day. This suit was brought by Herbert J. Bradley as administrator of the estate of Emma Ruth Bradley, who left no children or descendants of children surviving, to recover damages for her death. Upon trial with a jury a verdict for $1500.00 was returned in favor of the plaintiff. After overruling a motion for new trial the court entered a judgment on that verdict, from which this appeal has been taken.

The declaration consisted of three counts. The first charged that the servants and agents of the defendant so negligently and carelessly drove and propelled an engine and car attached thereto over and on said railroad up to and over said crossing on said public highway as to strike with great force and violence the automobile in which said Emma Ruth Bradley was riding, on the said crossing and that as a result thereof, she was killed. The negligence charged in the second count

was the failure to ring the bell or sound the whistle for the crossing as required by law. The third count charged that the defendant maintained on its right of way, immediately south of the crossing "a ground elevation" and had permitted weeds, vegetation, grass and brush to grow on said elevation to the heighth of five feet so that the same became an obstruction to the view of a person on the public highway. A plea of the general issue was filed to these counts. We have not been furnished with any brief or argument in behalf of appellee in this case, but while we have been denied the assistance that appellee should have rendered us we have nevertheless given the case careful consideration and decided the same upon its merits.

It is contended by attorneys for appellant that although Walker D. Hines was Director General of Railroads at the time this suit was brought, he was not at the time of the trial and entry of judgment, and that it was error for the trial court to enter judgment against him. Nothing appears upon the record to show that this question was raised in the court below. Not having been raised below we are of the opinion that appellant is not in position to raise that question on this appeal. It is also contended that it was error for the trial court to give the second instruction given in behalf of plaintiff, which read as follows: "You are further instructed that if you believe from the greater weight of the evidence that the defendant failed to blow a whistle or to ring a bell continuously for a distance of eighty rods before reaching the crossing in question and that Emma Ruth Bradley was in the exercise of all due care and caution for her own safety at and immediately before the collision, and that she did not know or by the exercise of ordinary care would have known of the approach of the said train to the crossing, and that she was injured as a result of the defandant's failure to blow a whistle or ring a bell continuously for a distance of at least eighty rods before reaching said crossing, if you believe from the evidence there was such a failure on the part of the defendant. then under such circumstances you may find the defendant guilty, provided you also believe from the greater weight of the evidence the plaintiff was also in the exercise of due care and caution at and immediately before the injury to the deceased." The complaint made of this instruction is that it in effect instructs the jury that the train crew was required either to blow a whistle continuously for a distance of 80 rods before reaching the crossing or to ring a bell continuously for that distance, when as a matter of fact under the Statute they had the option of ringing the bell for a part of that distance and sounding the whistle for the remainder or of ringing the bell or sounding the whistle all of that distance. It is no doubt the law that a railroad company is not required to ring the bell continuously for the distance mentioned or to sound the whistle continuously for that distance but may ring the bell for a portion of the distance and sound the whistle the remainder. Attorneys for appellant cite Rich v. Wilson, 205 Ill. App. 38 and St. Louis P. & N. Ry. Co. v. Rawley, 90 Ill. App. 653 in support of their contention that this instruction is erroneous. The portion of the instruction under consideration by this court in the Rawley case is set out in the opinion and

reads as follows: "And if the jury further believe from the evidence in this case that as defendant's engine and cars approached and reached said highway crossing the bell on the engine was not being continuously rung or that the whistle on the engine was not being continuously sounded, and that neither the bell nor whistle was sounded continuously for 80 rods from said crossing and until said crossing was reached by said engine." This court did hold that instruction misleading, but upon comparison it will be found that the wording of that instruction is materially different from the one here under consideration. That instruction required the bell to be continuously rung or the whistle to be continuously sounded, while the instruction in this case requires the railroad company to sound the whistle or ring the bell "continuously for a distance of 80 rods." While the instruction under consideration in the Rich case supra, is not set out in the report, yet from the abstract of the decision it appears that practically the same language was used there as in the Rawley case. We do not believe the jury could have been misled by the instruction given in this case and we therefore hold that the giving of the same did not constitute reversible error.

The plaintiff introduced a witness, Fred Rendleman, who testified that no bell was rung or whistle sounded as the engine approached the crossing. On cross examination he was asked if he had not stated to the claim agent of the railroad company the next morning after the accident that he could not say whether the whistle was sounded or the bell was rung or not, and his answer was in substance that he did not remember. The defendant introduced a witness, Mary Finney, who testified that she heard such questions asked the witness Rendleman, and that he answered as it is claimed by defendant he did answer. The defendant then offered to prove by two other witnesses that the questions were asked and answers made by way of impeachment of the witness Rendleman, but the court did not admit this evidence on the ground that the witness did not deny making the statements when on the stand. Under the rules of evidence, we think this proof might well have been admitted. It is to be observed, however, that Rendleman did not directly deny making the statement in question and the refusal of the court to admit the impeaching testimony did not constitute reversible error. The evidence was contradictory, as is usually true in cases of this class as to whether the bell was rung or the whistle sounded on the approach of the train to the crossing and also on the question whether the ground elevation and vegetation thereon just west of the south bound track, constituted an obstruction to the view of persons approaching the tracks from the west.

The most important and the closest question in the case is whether the deceased was in the excercise of ordinary care and caution for her own safety prior to and at the time of the injury. Herbert J. Bradley testified that he stopped at or near the stop signal and looked both north and south and neither saw nor heard any train. In this he is not contradicted. No member of the train crew claims to have seen the automobile until after it was struck. It is difficult to understand how if appellee stopped and looked, he could have failed to see the engine unless there was, as he claims, an obstruc-

tion to the view of the track. Witnesses testified positively in behalf of appellee that the view was obstructed, while others testified as positively for appellant that there was no obstruction. However, we think the evidence shows conclusively that there was some elevation west of the south bound track and that there was some vegetation thereon. The evidence also shows that the engine in question was a new one or had been recently repaired and for that reason was being run slowly and was making but little noise. Upon the whole proof we do not feel justified in disturbing the verdict of the jury on the ground that it was against the manifest weight of the evidence on the questions of fact above referred to. The judgment of the court below will be affirmed.

Affirmed.

Not to be reported in full.

Term No. 23 Agenda No. 7

IN THE APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

OCTOBER TERM, A. D. 1921

FRANCIS W. KIRSCH,
Appellee.
v.
FRANCIS KIRSCH, Sr.,
Appellant.

Appeal from
City Court of
East St. Louis.

Opinion by Higbee, P. J.

This was an action of forcible entry and detainer brought by appellee against appellant under the 8th clause of section 2 of the Forcible Entry and Detainer Act. On the trial appellee proved service upon appellant of a demand for possession of the premises involved and introduced in evidence a quitclaim deed from appellant to appellee for the property in question. This deed did not recite any definite consideration but stated that it was executed "for and in consideration of the sum in hand paid." This was all the evidence introduced by appellee in chief. Appellant testified that it was understood between him and appellee that appellant was to continue in the possession and occupancy of the premises after the execution of the deed until appellee paid him the sum of $3500.00 which appellant had invested in the property. In rebuttal appellee denied that any such agreement or arrangement was made. At the close of all the evidence the court, on motion of appellee, gave a peremptory instruction directing a verdict for appellee.

The question before the court on this record is whether it was error for the trial court to give this peremptory instruction. If the evidence of appellant to the effect that the deed was executed with the understanding that he was to receive $3500 and continue to occupy the premises until paid that sum was competent and proper evidence, then clearly the case should have been submitted to the jury. Although appellee denied that such was the agreement, yet it was for the jury to determine upon which side was the greater weight of testimony. Attorney for appellee contends that this evidnce was incompetent and improper for the reason it was with reference to an interest in real estate, not to be performed within one year and would therefore have to be in writing before admissible under the Statute of Frauds. If this matter, as testified by appellant, is true it certainly was the consideration for which the deed was executed.

While it is true that appellee by proving demand and introducing the deed made out a prima facie case entitling him

to possession, yet appellant had the right to establish any legal defense he had showing why he was entitled to retain possession. If then part of the consideration for the execution of this deed was that appellee should retain possession of the premises, then appellee should be allowed to show the same if he could do so by competent proof. It is well established by decisions of the Supreme Court of this state that parol evidence is admissible to show the true consideration of a deed, although it may be different from that named in the deed itself. A collection of some of the decisions of this state laying down that doctrine is found in MacNeil on Evidence, pages 304 and 305. It was therefore, under these authorities, proper for appellant to show by parol evidence what the true consideration in this deed was. The question then arises, was this proof admissible under the Statute of Frauds? Under the agreement or arrangement as testified to by appellant there was no definite time within which he was to be paid this $3500.00. It appears that he claims it was to be paid to him whenever appellee sold the premises. It has often been held by courts of last resort in this state that the test, whether a contract is within that part of section 1 of the Statute of Frauds and Perjuries providing that any agreement that is not to be performed within the space of one year from the making thereof must be in writing, is whether, at the time such agreement was made it could have been performed within one year, and not whether in fact such contract was so performed, and hence if performance within one year was possible, the contract is not within the Statute (Mutual Life Ins. Co. v. Ritsher, 196 Ill. App., 27). In the instant case it was possible and quite probable under appellant's version of the transaction that the agreement as to the payment of $3500.00 might be performed within a year from the time it was made, so that such agreement, under the above test, is not within section 1 of the Statute of Frauds and Perjuries. We have been unable to find any decision in this state holding that the same test is applicable to that portion of section 2 of the Statute on Frauds and Perjuries concerning any interest in lands for a longer term than one year. It was held by the Appellate Court of the First District in the case of Hirsch v. Kohn, 20 Ill. App. 330, that an oral lease which was not for any fixed or definite term was not within the Statute of Frauds and Perjuries for the reason that it did not appear that it could not have been performed within one year. Jones in his work on Landlord and Tenant, Section 154, lays down the following doctrine, "A lease for real estate until such time as lessor pays lessee a certain indebtedness, is neither an agreement that is not by its terms to be performed within a year from the making therof, nor an agreement for a leasing for a longer period than one year and is not required to be in writing."

Such authorities as we have been able to discover upon the subject appear to hold that a contract for any interest in or concerning lands for a longer term than one year is not within the Statute of Frauds and Perjuries if such interest may be terminated before the expiration of one year from the making of the contract. The reasoning used by the courts of this state in holding that a contract which may be performed within one

year from the making thereof does not come within section 1 of that Act, applies with equal force to that portion of Section 2 of the same Act here under consideration. We are therefore of the opinion that the agreement or arrangemnt testifid to by appellant, if made, was part of the real consideration for the deed, also that appellant's right to occupy the premises under that agreement might have been terminated within one year from the time it was made, and that therefore it was not within the Statute and not required to be in writing. Parol evidence of this agreement or arrangement was therefore competent and it was a question of fact for the jury to determine whether or not such agreement or arrangement was established by the evidence. It follows that the trial court erred in giving the peremptory instruction in favor of appellee and for that error the judgment is reversed and the cause remanded.

Reversed and Remanded.

Not to be reported in full.

Term No. 29 Agenda No. 1

IN THE
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

OCTOBER TERM, A. D. 1921.

J. S. WALKER,
Appellant.
vs.
FRANK ARMSTRONG,
Appellee.

Appeal from
Crawford.

Opinion by Higbee, P. J.

Appellant brought this suit to recover commissions which he claimed was due him from appellant for the sale of the latter's farm. The trial resulted in a judgment from which this appeal has been prosecuted.

Appellant, as it appeared from the evidence, was a real estate agent residing in the Village of Palestine, Illinois, and appellee was the owner of a farm some six miles south of that place. On or about the last of March or the first of April, 1919 appellant had been showing some farms which had been listed with him for sale, to one Virgil Hyre, with the view of selling some one of them to him. Late in the evening of that day they called at appellee's home where appellant introduced Mr. Hyre to appellee and either appellant or Mr. Hyre inquired of appellee if he desired to sell his farm. Some conversation then ensued in which appellant took little or no part and later the three parties went over and examined the dwelling. Before leaving Hyre offered to pay appellee $6800.00 for the farm which was not accepted. The next day appellee met Hyre in Palestine and Hyre offered him $7000 for the farm but no trade was consummated at that time. Later, however, after some correspondence between appellee and Hyre, the deal was closed and Hyre purchased the farm for $7000. The evidence shows there was no express contract between the parties constituting appellant the agent of appellee for the sale of his farm. There had been some conversation at different times concerning the sale of the farm but appellee testified he had always refused to list his farm with appellant except at one time he told appellant he could have all he could sell the farm for over and above $6500.00 but that this proposition was not accepted. Appellant does not claim here that he had an express contract with appellee, but contends that appellee knew he was a real estate agent; that he produced a purchaser for appellee's farm, and that appellee accepted the benefits of his services whereby an implied contract arose from which appellee became liable to him for what those services were reasonably

worth. In accordance with his contention appellant introduced proof tending to show that his services were worth $175.00. Appellee introduced a witness who testified appellant told him about the first of May, 1919, that he, appellant, had had nothing to do with the sale of appellee's farm.

Under the proof in this case we do not feel warranted in disturbing the verdict of the jury. Appellant complains of instruction No. 6 given in behalf of appellee. That instruction is as follows: "You are instructed that although you may believe that Walker was a real estate agent engaged in finding purchasers of real estate for owners thereof, desiring to sell the same, and that he found a purchaser of the land of the defendant, yet this alone voluntarily made by the plaintiff would not entitle him to a commission, for such services voluntarily made without any agreement on the part of the defendant with the plaintiff." It is the contention of appellant that by the use of the word "agreement" as it occurs in this instruction, the jury was informed that appellant could not recover in this case unless he had shown an express agreement with appellee. This instruction was not well drawn but it correctly states an abstract proposition of law which could not have been misunderstood by the jury. Under the circumstances named in the instructions no implied promise would arise so if there was not an express promise or agreement plaintiff could not recover.

It is further asserted by appellant that a rule of the trial court provided "no more than 10 instructions on a side will be considered by the court unless otherwise ordered before the argument begins," and that this rule was violated in behalf of appellee. It appears from the record that while eleven instructions were submitted by appellee, only nine of them were given. Even though this rule was violated that act alone would not be reversible error unless it was apparent that injustice had been done. (Field v. The C. D. & V. R. R. Co., 68 Ill. 367) The violation of such rule in this case does not appear to us to have worked any injustice to appellant. The judgment is affirmed.

Not to be reported in full.

Term No. 41 Agenda No. 43

IN THE
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

OCTOBER TERM, A. D., 1921.

DOSEY DOUGLAS, Administratrix of the Estate of A. D. DOUGLAS, deceased,
vs.
SESSER COAL COMPANY, Appellant.

Appeal from Franklin.

Opinion by Higbee, P. J.

On the 14th day of April, 1913 Dosey Douglas, the administratrix of the estate of A. G. Douglas, deceased, appellee, instituted a suit in the Circuit Court of Franklin County against the Franklin County Collieries Company and on the 16th day of May, 1913, filed a declaration in such suit to the May term of that court, alleging that the defendant therein negligently caused the death of the deceased, A. C. Douglas on February 24, 1913 while employed as a miner by the defendant and seeking to recover damages therefor. This declaration contained no allegation that the parties to the suit or either of them were or were not within the Workman's Compensation Act of 1911, in force May 1, 1912. On June 9, 1913 appellee filed an amended declaration against the same defendant which also contained no allegation concerning the Workman's Compensation Act of 1911. On August 29, 1913, appellee, in the same suit, filed an amended declaration consisting of two counts against the Sesser Coal Company based upon the same cause of action. In this declaration appellant was the only defendant and it was the first time appellant was made a defendant in this suit. This declaration consisted of two counts and each count contained the following allegation, "And the plaintiff further says that at and prior to the time of the death of the said A. G. Douglas, as above set forth, there was in full force and effect in this state an Act in relation to the payment of compensation to employes suffering accidental injures or death in the course of employment, but the defendant in this case did not elect to be bound by said act and did not in pursuance of said Act at the time of hiring of the said A. G. Douglas deceased, personally give to him a legible statement in writing, and did not post at the said mine or at the place where he was employed, such a statement containing the provisions and conditions of said Act, and thereby this plaintiff is not bound by the term and conditions of said Act and elects to pursue her aforesaid action as at common law."

On June 5, 1919 appellee by leave of court filed another

amended declaration in this cause consisting of three counts, each of which alleged in effect that appellant had elected not to be bound by the provisions and terms of the Workmen's Compensation Act of 1911 and had filed its notice and statement in writing to that effect with the State Bureau of Labor Statistics as required by the provisions of that Act. Appellant moved to strike this declaration from the files. This motion was overruled after which appellant filed a plea of not guilty and a special plea of the statute of Limitations. A verdict was returned in favor of appellee and against appellant in the sum of $1500 and judgment was entered for that amount. To review such judgment appellant has brought the record to this court. He assigns many reasons why the judgment should be reversed but we deem it necessary to discuss only one of them as that will fully dispose of the case.

At the time the injury complained of occurred the Act providing for compensation for accidental injuries or death approved June 10, 1911 in force May 1, 1912, was in force and the same by its terms and provisions applied to the business in which appellant and appellee were engaged. Section 3 of this Act provides "no common law or statutory right to recover damages for injury or death sustained by any employe while engaged in the line of his duty as such employe other than the compensation herein provided shall be available to any employe who has accepted the provisions of this Act." Paragraph A of Sub-Section 3 of Section 1 of said Act provides that every employer included in the Act "is presumed to have elected to provide and pay the compensation according to the provisions of this Act, unless and until notice in writing of his election to the contrary is filed with the State Bureau of Labor Statistics." Paragraph C of said sub-section provides that when such election is made by the employer, the employe shall be deemed to have accepted all the provisions of said Act and is bound thereby, unless within 30 days after his hiring and the taking effect of the Act he shall file a notice to the contrary with the Secretary of the State Bureau of Labor Statistics. This court in Krisman v. Johnston City and Big Muddy Coal and Mining Co. 190 Ill. App. 612, after referring to the above provisions of said Act, said, "It thus appears to be a presumption of law that both appellant and appellee were covered by the provisions of said Act, unless it should appear that one or both of them had filed an election to the contrary with the State Bureau of Labor Statistics as provided by law." If the parties were covered by the provisions of that law then appellee had "no common law or statutory right" to recover damages for the death of her intestate except as provided by that act, and this suit would not lie. (Krisman v. Johnston City & Big Muddy Coal and Mining Co., supra; Dietz v. Big Muddy Coal and Iron Co., 263 Ill. 480). It being the law that the parties to this suit were presumed to be covered by the Act of 1911, and if, so covered that appellee had no right to maintain an action at law, then in order to state a good cause of action appellee's declaration should have alleged that appellant had elected not to be bound by the provisions of that Act and had taken the steps to make that election which were prescribed by that Act, to make the election effective. In our opinion no declaration prior to the one filed June 5, 1919 sufficiently alleged that appellant had elected not to be bound by the 1911 Com-

pensation Act. It is true that the declaration filed August 29, 1913 did contain certain allegations in that respect as above set forth. Those allegations however were not in substance or effect allegations that appellant had elected NOT to be bound by the Act by filing the notice required, but that appellant had not elected to BE bound by the Act and had not given to deceased and posted in the mine a statement containing the provisions of the Act. Had the case been tried on this declaration and had appellee proved as alleged in that declaration that appellant had not elected "to be" bound by that Act and had not given and posted the statement, yet that would not have been proof that appellant had elected not to be bound by the Act by filing notice with the State Bureau of Labor Statistics, as provided by the act and which was necessary to a recovery by her in this case. Both the deceased and appellant were automatically made subject to the law without any election or affirmative action upon their part. In considering this same act the Supreme Court in Dietz v. Big Muddy Coal & Iron Co., supra, held, "both the employer and the employe in the specified employment became subject to the Act without any affirmative action upon their part. The elective feature of the act is to be exercised to AVOID being governed thereby, and not to cause the Act to be applied in any given case." It is obvious from the reading of the authorities above cited that it appeared from the face of all the declarations filed up to and including the one filed August 20, 1913 that appellant was automatically covered by the Compensation Act of 1911. It was therefore necessary for appellee before she could have stated a cause of action against appellant to have alleged that appellant had elected not to be bound by the provisions of the Act. If she did not file a declaration stating a cause of action before the Statute of Limitations had run then such statute had become a bar and the filing of an amended declaration stating a cause of action, after the Statute of Limitations had run, would be the commencement of a new suit, to which the Statute of Limitations would be a bar. As no declaration prior to the one of June 5, 1919 stated a cause of action it must follow that the last amended declaration which stated a cause of action did state a new cause of action, that is, one which had never been stated before, and hence the Statute of Limitations was a good defense. In Eylenfeldt v. Illinois Steel Co., 165 Ill. 185, practically this same question was before the Supreme Court and it was there said, "the amended count, does, however, set up a cause of action, but, in as much as the original declaration stated no cause of action, it seems to follow that the amended declaration stated a new cause of action,—one which had never been stated before,—and hence the Statute of Limitations was a good defense. There could be no re-statement of a cause of action by the amended declaration unless the cause of action had been stated before." This language is quoted with approval by the Supreme Court in Mackey v. The Northern Milling Co., 210 Ill. 115. A collection of other decisions of the Supreme and Appellate courts of this state, laying down the same doctrine will be found in note 67, 25 Cyc. 1309.

The Supreme Court in the case of Carlin v. City of Chicago, 262 Ill. 564 held that the following proposition of law must be regarded as fully established by the decisions of that court,

to wit: "If the original declaration fails to state any cause of action whatever, and an amended declaration is filed, after the Statute of Limitations has run, which does state a cause of action, the filing of such amended declaration will be regarded as the beginning of the suit for that cause of action and the Statute will constitute a good defense," citing Foster v. St. Luke's Hospital, 191 Ill. 94; Doyl v. City of Sycamore, 193 Ill. 501 and Mackey v. Northern Milling Co., supra.

Under these authorities we must therefore hold that the declaration filed August 29, 1913 and all of the declarations filed prior thereto failed to state a cause of action; that the amended declaration of June 5, 1919, which does state a cause of action, but which was filed after the Statute of Limitations had run, was the beginning of a new suit for the cause of action stated in that declaration; that the Statute of Limitations constituted a good defense to that action and therefore appellee cannot sustain a recovery in this case.

The judgment of the trial court is reversed.

Reversed.

Not to be reported in full.

Term No. 43 Agenda No. 22

IN THE
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

OCTOBER TERM, A. D., 1921.

EICHENSEER BROS.,
Appellees.
vs.
WILLIAM GUILD,
Appellant.

Appeal from
Pulaski.

Opinion by Higbee, P. J.

This is an appeal from a judgment in favor of appellees, in an action of forcible entry and detainer brought by appellees against appellant to recover possession of certain real estate in Pulaski county.

It appears from the evidence that in the early part of 1920 appellees leased to appellant the premises herein question and also other premises under a verbal contract. The understanding was that appellant was to have the house till August 1, 1920 and other premises as corn land until January, 1921, it being understood that appellees would want possession of the house for their brother on August 1, 1920 . Shortly before August 1920 appellees learned their brother did not want the house, and, as they contend, informed appellant he could have the house until their brother should come, and on the 8th of October, having learned their brother would come by the first of April, 1921, they informed appellant verbally they would want the house the first day of March. On the 3rd day of January, 1921, they served him with a written notice to vacate the premises. Appellant contends that prior to the first of August, 1921, he was informed by appellees that their brother was not coming for another year and that he did not have to move out but could keep the place for another year with the same corn land, truck patches and the house. Counsel for appellant appears to take the position that appellees had either leased appellant the premises for another year or that the tenancy had become one from year to year and could therefore be terminated only at the end of a year.

The contentions above referred to were questions of fact for the jury under proper instructions as to the law. The respective parties introduced proof tending to support their several contentions, and no complaint is made concerning the instructions. Under such conditions it is the general rule that the verdict of the jury should not be disturbed. Among other contentions of the appellant is the one that the notice given by appellees to terminate the tenancy, did not describe the prop-

erty sufficiently to entitle it to go to the jury. The property in question was described in the notice as "the premises you now occupy belonging to us in the county of Pulaski, State of Illinois." While this description does not describe the premises by section, town and range, we consider it sufficient. A general description or any description by which the premises can be readily identified and located is all that is required. (Haynes v. Sherwin Williams Co., 126 Ill., App. 414; Stevens v. Cary, 183 Ill. App. 24). Especially is this true where it appears, as it does in this case, that all parties to the action knew exactly what property was intended to be designated. (Kraatz v. Workman, 202 Ill. App. 95.) No error appearing in the record, which appears to us to demand a reversal, the judgment is affirmed. Affirmed.

Not to be reported in full.

Term No. 48. Agenda No. 37.

IN THE APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

OCTOBER TERM, A. D. 1921

WILLIAM METEER,
Appellee.
v.
MORRIS STERNBERGER,
Appellant.

Appeal from
City Court of
East St. Louis.

Opinion by Higbee, P. J.

This suit was instituted by appellee, William Meteer, before a Justice of the Peace in the City of East St. Louis against appellant, Morris Sternberger, doing business under the trade name of "Empire Furniture Company," to recover damages for the alleged unlawful taking and conversion by appellant of certain household goods claimed by appellee. Judgment was rendered in the justice court against the appellant for $187.00. On appeal to the city court of East St. Louis, a verdict was returned for the plaintiff in the sum of $70. This appeal was prosecuted to reverse the judgment entered by the court on that verdict. No question is raised on the instructions or rulings on the evidence. As stated by attorney for appellant in his argument, the only question presented to this court is whether the verdict is supported by the evidence and the law.

Appellant is engaged in the retail furniture business in the city of East St. Louis on both the cash and time payment plans. On the 6th of October, 1915, he sold appellee furniture to the amount of $37.00 and on March 15, 1916, he again sold him some furniture to the amount of $74.15. On March 16, 1916, appellee executed to appellant his promissory note for the total amount of these purchases in the sum of $74.50 and to secure the payment of that note executed a chattel mortgage to appellant on the property purchased. Appellee had made some payments on his purchases before the note was given but credits for the same were endorsed on the back of the note. He continued making payments until December 12, 1916, when there remained due on the note $9.50. On that day he purchased a chifforobe for $27.50 and a kitchen cabinet for $32.50, a total of $60.00, which with the $9.50 due on the old account left a total indebtedness due appellant of $69.50. To this extent the facts appear to be undisputed.

Appellant contends and testified that on January 23, 1917, appellee, with his father, John Meteer, came to appellant's store and said that he had had trouble with his wife and desired to transfer his account to his father; that appellant ad-

vised him such transfer could be made and that he had his bookkeeper, a Miss Snyder, who has since died, make the transfer of appellee's account on his books to John Meteer, father of appellee; that John Meteer advised him, however, that he did not like the chifforobe appellee had purchased and arranged to exchange it for another at an additional cost of $2.50 and that such exchange was made; that later on, the 20th day of February, 1917, John Meteer executed a note to appellant for $69.50 and gave him a chattel mortgage on the property to secure that note. It appears that no payments were made on the last note by either appellee or John Meteer, and that on the 19th day of March, 1917, appellant replevied the goods from John Meteer and sold them under his chattel mortgage for the sum of $50.50 and later brought suit against John Meteer for the balance of the indebtedness and secured judgment for the same which remains unpaid. Appellee then brought this suit based upon the contention that the property replevied and sold belonged to him. It appears that appellee at the time this suit was instituted was not and since has not been in East St. Louis and it is contended by appellant that this suit was in fact brought by John Meteer in the name of appellee

John Meteer testified that appellee, his son, never went with him to appellant and made a transfer of any kind and that he did not sign his name to the mortgage note introduced in evidence. Appellee's father and mother testified in substance that the property replevied belonged to appellee. No note signed by John Meteer was introduced in evidence. Appellant did introduce in evidence what purported to be a copy of a note signed J. Meteer and testified that the original note had been left with the justice of the peace before whom suit had been instituted on the note. A mortgage also purporting to be signed by J. Meteer was introduced in evidence. As above stated this property had been replevied in a suit against John Meteer. Whether this property belonged to appellee, William Meteer or to his father, John Meteer and whether appellee's account had been transferred and charged to his father and whether John Meteer had thereupon given to appellant his note and the mortgage on the property securing the same, were all questions of fact to be determined by the jury.

There being no assignments of error on the giving or refusing of instructions it must be presumed by this court that the jury was fully, fairly and accurately instructed. The jury heard the witnesses testify and observed their demeanor and behavior upon the witness stand and so did the trial court who overruled the motion for new trial. While the proof is not clear as could be desired, yet under the record as presented to us we cannot say that the verdict is so manifestly against the weight of the evidence that it should be disturbed. The judgment will therefore be affirmed.

Affirmed.

Not to be reported in full.

Term No. 57 Agenda No. 31

IN THE
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

OCTOBER TERM, A. D. 1921.

ROSCOE STEVENS, by DOLLIE STEVENS, His Mother and Next Friend,
Appellee,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY,
Appellant.

Appeal from Marion.

Opinion by Higbee, P. J.

Roscoe Stevens, by Dollie Stevens, his mother and next friend, brought this suit against the Illinois Central Railroad Company, in the circuit court of Marion county, to the September Term, A. D. 1920 to recover damages for personal injuries sustained by him when a truck which he was driving, was struck by a passenger train of said railroad company at a public crossing in the village of Odin on June 29, 1920. This appeal is prosecuted by the company to reverse a judgment against it for $1900. The declaration consisted of an original and three additional counts. The original count charged in general terms that appellant carelessly and negligently managed and operated its locomotive and train of cars, that the same struck a truck upon which appellee was riding along a public highway in the Village of Odin, using due care and caution for his own safety, and injured him.

The first additional count alleged that appellant at the time of the accident, by its agents and servants, drove its locomotive, engine and train at a rate of speed of 55 miles an hour in violation of an ordinance of the Village of Odin, limiting the speed of trains within the corporate limits of such village to 10 miles an hour and by reason thereof the said locomotive struck the truck which plaintiff was driving resulting in injuries to him. The second charged that there were certain buildings at the crossing where the accident occurred which obstructed the view of the train in approaching upon appellant's track and while the plaintiff using due care and diligence was crossing the track appellant well knowing that the view of said crossing was obstructed, then and there by its servants carelessly and improperly drove and managed its locomotive and train at a high and dangerous rate of speed, to-wit, 55 miles per hour whereby appellee was injured. The third was based upon the alleged failure of appellant to provide and keep sounding a bell or steam whistle on its locomotive as provided by Statute.

Appellant filed the general issue and three special pleas to the declaration. The first and second special pleas averred

that appellant was engaged in the business of a common carrier doing a general railroad business at the time of the alleged injury; that the plaintiff, Roscoe Stevens, was at that time an employe of one Robert D. Stoafer; that the said Stoafer was then and there engaged in the business of carriage by land, and loading and unloading in connection therewith; that at the time of the alleged injury the said Roscoe Stevens was in the employ of said Stoafer in his business aforesaid, and was engaged in the performance of his duties and was driving the automobile truck in question in and about the business of said Stoafer; that the said Roscoe Stevens did not at any time prior thereto file with the Industrial Commission of the State of Illinois, any notice of withdrawal from the operation of the Workman's Compensation Act of the State of Illinois and that the said Roscoe Stevens and the said Robert D. Stoafer as well as the appellant, were all and each of them bound by the provisions of such Act. The third special plea averred that the plaintiff at the time he received his alleged injuries was employed by one Roscoe D. Stoafer to operate the motor truck in question and that the said Stoafer was operating said truck for hire and profit; that the said Roscoe Stevens was not a licensed chauffeur under the laws of the State of Illinois and was employed by the said Stoafer with the knowledge, consent and concurrences of Roscoe Stevens in violation of the Laws of Illinois to operate said motor truck upon the public highways and that by reason thereof the supposed causes of action mentioned in plaintiff's declaration were based upon the appellee's unlawful act which concurred in and caused the damages complained of. A demurrer was sustained to each of these special pleas. At the January Term, 1921, two additional special pleas were filed by appellant by leave of court, setting up in substance the same facts averred in the first and second special pleas and in addition thereto alleging that at the time of the alleged injury the said employer, Robert D. Stoafer then and there had in his employment in said enterprise and business more than three employes. A demurrer filed to these two additional special pleas was overruled, whereupon plaintiff joined issue thereon. The plea of the general issue was also filed and issue joined thereon.

The first assignment of error argued by appellant is that the court erred in sustaining the demurrer to the first and second special pleas. There is some question as to whether or not the two additional special pleas filed by appellant, which contain the same and other matters alleged in the first and second special pleas, were not such pleading over as to waive appellant's right to question on this appeal the trial court's ruling on such demurrer. However since appellee has not raised that question we will consider it as properly before this court. Section 3 of the Workman's Compensation Act as amended in 1919 provides "the provisions of this Act hereinafter following shall apply automatically, and without election to the state, county, city, town, township, incorporated village or school district, body politic or municipal corporation, and to all employers and their employes, engaged in any of the following enterprises or businesses which are declared to be extra hazardous, namely * * * 3. Carriage by land or water and loading or unloading in connection therewith, including the distribution of any commodity by horse draw nor motor driven vehicle where the

employer employes more than three employes in the enterprise or business, except as provided in sub-paragraph 8 of this section." It is the settled law that where an employe and his employer are both under the Workman's Compensation Act and the employe in the course of his employment is injured by a third person who is also under the Workman's Compensation Act, such employe has no right of action against such third person causing the injury, but can only recover from his employe such compensation as is due him under that Act, and his employer is subrogated to the rights of the employe and may bring an action against such third person causing the injury to recover the compensation paid to the injured employe. (Friebel v. Chicago City Ry. Co., 280 Ill. 76; Keeran v. P. B. & C. Co., 277 Ill. 413; Rogers v. I. C. R. R. Co., 210 Ill. App. 577.) It was the purpose of these two special pleas to set up that defense in behalf of appellant in this case. The trial court sustained the demurrer to these pleas on the ground that the fact therein alleged did not show that Roscoe Stevens and his employer were under the provisions of the Workman's Compensation Act, for the reason that the pleas failed to allege that the employer employed more than three employes in his business. It is contended by appellant that the pleas show that Stoafer, the employer, was engaged in "carrage by land or water and loading or unloading in connection therewith" and that the provisions of the statute "where the employer employes more than three employes" does not apply to such business but was intended to apply only to employers engaged in business other than "earriage by land or water" who employed in their business more than three employes and who, as an incident to such other business, were delivering commodities by horse drawn or motor driven vehicles. It seems to us, from a consideration of the statute, it was the intention of the Legislature that only such persons engaged in carriage by land or water should come within the provisions of the Act as employed more than three employes in that business. If we are right in our view then it is clear that these pleas, which failed to allege that the employer employed more than three employes in his business, would not upon their face show that plaintiff's employer and himself came under the provisions of the Workmen's Compensation Act. It was therefore not error to sustain the demurrer to these pleas. The two additional special pleas filed at the January Term, 1921, did contain the allegation that the employer employed in his business more than three employes. While no error is argued concerning these pleas we think it best to say that in our opinion the evidence fails to sustain this allegation and does not show that Stoafer, the employer, had more than three persons in his employ within the meaning of the Workmen's Compensation Act.

It is also argued that the trial court erred in sustaining a demurrer to appellant's third special plea. In our opinion the allegation of that plea would not constitute a defense to the cause of action set out in the declaration. The fact that Roscoe Stevens had no chauffeur's license, as required by the Statute, would not, of itself, authorize appellant to injure him negligently. It was sought to interpose practically the same defense as set out in this plea in the personal injury case of Engel v. Parmalee Co., 169 Ill. App. 410. In that case the plaintiff was injured while engaged in an employment, the

exercise of which required a license from the City of Chicago, and which license the injured person could not have obtained. In holding that such facts did not constitute a defense in that suit, the Appellate Court for the First District said "we cannot assent to a theory that he (plaintiff) had no right to be near the station at all, nor that his admitted prior violations of the ordinance and his admitted intention to violate it again if he had the opportunity, deprive him at the time of the injury of his civil rights as against a party against whom he was not individually offending even when he was actually in the act of violation." The court further held that even if the intended violation of the ordinance might be considered as bearing on plaintiff's rights as against the defendant or on his alleged contributory negligence, it would still be a question for the jury. The plea here under consideration does not show upon its face that Roscoe Stevens, even though he were actually violating the statute as claimed was at the time in any way committing any offense against appellant. In Graham v. Hagmann, 270 Ill. 252 it was held, that plaintiff's violation of an ordinance did not render him guilty of such contributory negligence as would bar his right to recover damages for personal injuries, unless the violation of such ordinance in some way approximately contributed to the accident in which he was injured. The plea in this case does not sufficiently allege facts showing that Roscoe Stevens' violation of the statute approximately contributed to his injury and it was not error to sustain the demurrer thereto.

Appellee called the Clerk of the Village of Odin who testified that the records of the ordinances of that village were destroyed by a fire. He then testified that plaintiff's "Exhibit A" was a copy of ordinance number 120 and that the certificate attached thereto was a correct copy of the certificate to the original ordinance. Upon this testimony the court admitted plaintiff's "Exhibit A" in evidence which purported to be a copy of an ordinance limiting the speed of trains within the village of Odin to 10 miles per hour. It is contended by appellant that this ordinance was not properly proved and that it was error to introduce the same in evidence. It is also contended that such purported copy could only be properly admitted in evidence after a compliance with the requirements of the Burnt Records Act. "The provisions of the Burnt Records Act are not exclusive, but merely cumulative upon the rights and remedies existing independently of its provisions, and records are to be deemed in law to be still existing and binding upon the parties whose rights are effected thereby, although, in point of fact, they have been destroyed." (People v. Pike, 197 Ill. 449). It was shown by the evidence that the original papers had been lost or destroyed and were not within the possession of or obtainable by appellee. The witness testified that he had read the original ordinance number 120 in the January preceding and that to the best of his knowledge "Exhibit A" was a true and correct copy of the original ordinance number 120 and the certificate thereto. This as we understand has been uniformly held to be sufficient to permit parol evidence as to the contents of a destroyed record. (People v. Pike, supra; Rose Hill & Evanston Road Co. v. People 115 Ill. 133). The evidence above referred to was ample foundation for the admission of plaintiff's "Exhibit A" in evidence. Plaintiff's

"Exhibit B" was an x-ray picture of films of Roscoe Stevens' skull and plaintiff's "Exhibit C" was a photographic print of this film. It is contended by appellant that these exhibits were improperly introduced in evidence for the reason, as claimed, that it is not shown that the film was taken or the photograph developed by x-ray experts or that the machines were in proper working order or that the picture correctly showed the conditions as disclosed by the x-ray machine. Without going into the evidence on this question in detail, we deem it sufficient to say that while the evidence in this respect was not as full and satisfactory as could be desired, yet it was on the whole sufficient to warrant the ruling of the court.

It is further contended by appellant that the court erred in admitting the testimony of certain physicians as to the effect of the injury sustained by Roscoe Stevens. The true rule governing the admission of the consequences of an injury as held by us in the case of Boss v. I. C. R. R. Co., 221 Ill. App., 504, "seems to be that all the consequences of such an injury, future as well as past which are shown by the evidence to be reasonably certain to result from the injury" are proper to be shown, but "such future consequences to be relied upon must be reasonably certain to result and cannot be speculative." In some respects the testimony here complained of is somewhat conjectural but it relates wholly to the extent and permanency of the injury bearing upon the amount of the damages and as the damages allowed in this case are moderate, we do not believe that this testimony worked any prejudice to appellant. Appellant's claim that the evidence does not show the accident occurred within the corporate limits of the village of Odin is without merit, as it appears from the testimony of several witnesses that the crossing in question was within the limits of that village. There was the usual contradiction in the evidence as to whether the bell was rung or the whistle sounded as required by law. As has been so frequently held this was a question of fact to be determined by the jury and while the evidence on that question is somewhat contradictory we are of the opinion that the preponderance of the same clearly supports the verdict in that respect.

Instruction 1 given for appellee fixed the time when he was required to be in the exercise of ordinary care for his own safety as, "at and immediately before the time of the accident" and his instructions 3 and 4 fixed the same as "at and immediately before the time the plaintiff was struck." Counsel for appellant argue that the effect of these instructions was to advise the jury that no care was required of the plaintiff in approaching the crossing but that if after he got on the crossing and immediately before he was struck he was exercising due care, then this was all that was required of him. We do not think the jury could have placed this narrow construction upon these instructions as the language used was clearly broad enough to include appellees approach to the crossing. Compaint is also made of a portion of appellees 4th instruction which undertook to advise the jury of the duties incumbant upon appellant in regard to the ringing of a bell or the sounding of a whistle in approaching the crossing in question. The instruction was not carefully worded upon this subject of complaint but it was substantially in the language of the statute and does not appear to us to transgress the rules of construc-

tion relating to the subject mentioned, laid down by the Supreme Court of this state. Complaint is also made of appellee's 5th instruction questioning plaintiff's right to recover for suffering in mind and body, if any, resulting from the injury. This instruction is in practically the same language as an instruction approved by the Supreme Court in Cicero v. Brown, 193 Ill. 274. . .

There is no doubt but that the evidence shows the train was running at a higher rate of speed than allowed by the ordinance introduced in evidence. The engineer of the train testified that if the brakes were working properly he could stop the train within a distance of 500 feet while traveling at the rate of 25 miles an hour, but on this occasion the train ran for a distance of 1000 or 1200 feet after he applied the brakes. It is also clear from the evidence that there were stock pens, buildings and cars which obstructed Roscoe Steven's view of the track as he approached the crossing. Whether or not appellant was guilty of negligence in any of the respects charged was a question of fact to be determined by the jury. We are of the opinion that the verdict is sustained by the evidence and there appearing to be no reversible error in the record the judgment is affirmed. Affirmed.

Not to be reported in full.

Term No. 60. Agenda No. 40.

IN THE APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

OCTOBER TERM, A. D. 1921

LOUIS SACHS,
Appellee.
v.
AMERICAN RAILWAY EXPRESS COMPANY,
Appellant.

Appeal from Marion.

Opinion by Higbee, P. J.

Appellee, Louis Sachs, in December, 1919, resided at Centralia, Illinois, and was engaged in the business of buying and shipping hides and furs. On December 16, 1919, he presented to appellant, The American Railway Express Company at Mt. Vernon, Illinois, three bags or sacks of fur for shipment to Hill Brothers, St. Louis, Missouri. This shipment weighed 45 lbs. and appellee placed thereon a valuation of $300.00 which he contended was less than their real value, but the value was stated as $300 in order to avoid paying an additional charge of $1.50. It is contended by appellee that this shipment was never delivered to Hill Brothers and this suit was instituted before a justice of the peace by him to recover the value of the furs. On appeal to the circuit court of Marion county appellee secured a verdict and judgment for $300.

The only question presented to this court is whether this shipment of the furs was delivered to Hill Brothers in St. Louis. It is not disputed that the three bags of furs were delivered by appellee to appellant at Mt. Vernon for shipment to Hill Brothers. Appellant's records showed their train messenger on the Southern Railway Company on December 16, 1919, received at Mt. Vernon a shipment of three bales of fur under way bill No. 989529 from Mt. Vernon, Illinois, to Hill Brothers at St. Louis. Their records further show that appellant received at its St. Louis depot on December 16, 1919, three bales of fur from Mt. Vernon, Illinois, to Hill Brothers, St. Louis on way bill No. 989529. Appellant's employe, however, who received and checked in this shipment at St. Louis, testified that he did not know whether the way bill was on those three bags when he received them at St. Louis, but that if the way bill had been missing a new way bill termed an "over" way bill would have been made out. Appellant's foreman of the fur department in St. Louis testified that defendant's Exhibits "C," "D" and "E" were "over" way bills issued by appellant to cover shipments received at St. Louis either on the night of December 16, 1919, or early in the morning of December 17, 1919, from which the original way bill or way bills had been lost en route. Exhibit "C" was "over" way bill No.

518702 calling for a bale of furs weighing 18 lbs. from Louis Sachs, Centralia, Illinois, to Hill Brothers, St. Louis, Missouri. Exhibit "D" was "over" way bill No. 518725 calling for a bale of fur weighing 8 lbs. from L. Sachs, Centralia, Illinois, to Hill Brothers, St. Louis, Missouri. Exhibit "E" is an "over" way bill calling for a bale of furs weighing 18 lbs. from Louis Sachs, Centralia, Illinois, December 17, 1919, to Hill Brothers, St. Louis, Missouri. Appellant's records also show that the furs covered by those "over" way bills Exhibits "C," "D" and "E" were delivered to Hill Brothers on December 30, 1919. It is contended by appellant that the evidence shows that appellee was in the habit of placing a shipper's tag on all shipments made by him which described the shipper as L. Sachs or Louis Sachs, Centralia, Illinois, no matter from what point the shipments were actually made, and that the furs covered by defendant's Exhibits "C," "D" and "E" were in reality the furs shipped by appellee from Mt. Vernon and were therefore delivered to the consignee. Appellant contends that the "over" way bills Exhibits "C," "D" and "E" describe shipment made from Centralia for the reason that the original way bill became detached from the packages and lost en route and that the "over" way bills were made out from a shipper's tag which mentioned the shipper as L. Sachs, Centralia, Illinois. There is, however, no positive proof in the record that the original way bill on the shipment from Mt. Vernon did become lost, nor is there any positive proof that appellee did attach to these bales a shipper's tag describing the shipper as L. Sachs, Centralia, Illinois.

On the other hand appellee testified that the three sacks of fur were shipped by him from Mt. Vernon and that they were bound together by him by wire at request of appellant's agent at that place. Appellee also testified that before leaving his home at Centralia, Illinois, on December 15, he had prepared other packages of fur for shipment to Hill Brothers and directed his family to ship them out. Appellant's records show that a shipment of fur was made from Centralia in appellee's name on December 17. Appellant did not show whether its records disclosed the number of packages in this shipment and appellee testified he did not remember. It is the contention of the appellee in this case that the fur delivered to Hill Brothers by appellant under the "over" way bills, defendant's Exhibits "C," "D" and "E" was the fur shipped in his name from Centralia on December 17. Appellant placed A. Berg, President and Manager of Hill Brothers, on the stand, who testified that appellee had been paid for the fur covered by defendant's Exhibit "C" and "E" and that fur covered by defendant's Exhibit "D" had been returned to him. No effort however, was made to show by this witness or any other witness that Hill Brothers had paid appellee for any other fur about this time, when as a matter of fact appellant's record showed that fur was shipped by appellee to Hill Brothers from Mt. Vernon on December 16 and from Centralia on December 17.

In our opinion this proof was sufficient to sustain the verdict and therefore the judgment based on it, should be affirmed.

Affirmed.

Not to be reported in full.

(2335a)

Term No. 26 Agenda No. 15

IN THE
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

OCTOBER TERM, A. D. 1921.

MAX SONZINSKI,
Appellant.
vs.
F. C. BLANKENSHIP,
Appellee.

Appeal from
City Court of
East St. Louis.

Opinion by Barry, J.

Appellant filed a bill in the nature of a bill of review to review a decree rendered against him in favor of appellee at the May Term, 1919, of the City Court.

Appellant, on May 18, 1918, entered into a contract with Oscar P. Kuehn, under which the latter was to furnish certain labor and materials for the sum of $757.00. On June 3, 1918, appellee contracted to build a brick garage for appellant for $4,000.00 out of which sum appellee was to pay Mr. Kuehn the amount of the contract between Mr. Kuehn and appellant. Later appellant employed appellee to erect an additional building for $2,200.00. Appellee furnished extra labor and materials to the amount of $478.00 thus making the total amount appellant was to pay appellee $6,678.00. Appellant paid the Kuehn bill and other bills, and paid appellee cash amounting in all to $6096.62. The Court entered a decree for $1081.28.

Appellant contends that the Court did not allow him credit for the amount of the Kuehn bill which the evidence shows that he paid and that the Court charged him with $550.00 for which he was in no way liable. We find from the evidence that Appellant was given credit for the amount of the Kuehn bill and his contention in that regard is without merit.

The Master and the Court found that the total amount of the indebtedness from appellant to appellee was $6678.00 and it was admitted by counsel for appellee both in his printed and oral arguments that such is the fact. It was also admitted that the charge of $550.00 made against appellant was for subcontractors bills paid by appellee. Under his contracts with appellant it was the duty of appellee to pay the subcontractors so it was clearly improper to charge appellant with that amount.

Appellee has assigned cross errors to the effect that the Court erred in not dismissing the bill for want of equity; in not affirming the former decree; in reducing the amount of his

lien and in not allowing him interest. In equity interest is allowed or withheld, as, under all the circumstances of the case, seems just and equitable; Keady vs. White, 168 Ill. 76. We are not prepared to say that the action of the Court in refusing to allow interest was an abuse of discretion. The cross errors are without merit.

The decree is reversed and the cause remanded with directions to modify the decree so as to reduce the amount thereof by deducting therefrom the sum of $550.00 and to insert a recital therein, that the former decree rendered at the May Term, 1919, of said City Court be and the same is set aside.

It is further ordered that appellant pay one-half of the costs in this court, and that appellee Blankenship pay the other half thereof.

Reversed and Remanded with Directions.

Not to be reported in full.

Term No. 28 Agenda No. 6

IN THE
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

OCTOBER TERM, A. D. 1921.

W. F. LOYD,
Appellant.
vs.
CHARLES W. ROBERTSON,
Appellee.

Appeal from
Clay Circuit
Court.

Opinion by Barry, J.

Appellant recovered a judgment against appellee before a Justice of the Peace and on appeal to the circuit court the verdict and judgment were in favor of appellee.

The evidence on behalf of appellant tends to show that he sold and delivered to appellee an automobile, the purchase price of which was $225.00 for which amount appellee and his son executed their note to appellant.

The note was afterwards altered so as to call for interest from date instead of maturity. Appellant claimed the alteration was made with the knowledge and consent of appellee. Prior to the commencement of this suit, and after appellee knew of the alteration of the note, he wrote appellant a letter in which he stated: "I never told any one that I did not intend to pay that note. * * *. I will tell you just what I intend to do. If you will let me pay my open account as I can and not have to go and borrow it and give me all the time I need to pay the note why I intend to pay it. But if I have to borrow or cause me any hardship on it that will be different. When you changed and altered that note you made it null and void and according to law it is paid etc."

It will be seen, therefore, that appellee recognized that he had an open account with appellant even if he was not liable on the note because of its alteration. There was no evidence of an open account other than for the purchase price of the car. Appellant contended that the car was purchased by his son who was a minor and that he simply signed the note as surety, and the note having been altered without his consent there could be no recovery.

On the trial of the case both sides went into the question as to who was the purchaser of the car. If appellee purchased the car for $225.00 appellant was entitled to recover even though the note was altered without the consent of appellee.

The Court ignored appellant's right to have the jury determine whether appellee purchased the car. This is evident from the refusal of appellant's refused instruction by which it

was sought to submit that question to the jury. Also by appellee's first and second given instructions which informed the jury that if the note was altered without the consent of appellee their verdict should be in his favor.

Appellee seeks to justify the ruling on instructions on the theory that counsel for appellant in his opening statement of the case before the jury conceded that appellant would not be entitled to recover if the note was altered without consent of appellee.

While counsel stated that it was a suit on a promissory note, yet, he went on to say that there would probably be a dispute as to whether appellee was principal or surety; that appellant sold appellee an automobile and the note was given for the purchase price; that appellee's son was a minor at the time and that appellant would not make the deal with the son for that reason. Both sides, without objection, offered evidence as to who was the purchaser of the car, so that the appellee waived any question in regard to the matter.

But counsel was not required to make an opening statement and if he made one his admission would not be binding on his client nor was he confined to it in the introduction of evidence, Pietsch vs. Pietsch, 245 Ill., 454.

There is no escape from the conclusion, therefore, that the Court committed reversible error in giving appellee's first and second, and in refusing appellant's instruction. The judgment is reversed and the cause remanded.

Reversed and Remanded.

Not to be reported in full.

Term No. 32. Agenda No. 36.

IN THE APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

OCTOBER TERM, A. D. 1921

ARNOLD FREEBURG, Defendant in Error. vs. W. L. ROSS, Receiver, &c., Plaintiff in Error.	Error to City Court East St. Louis.

Opinion by Barry, J.

In an action on the case defendant in error recovered a verdict and judgment for $15,500.00 on account of serious personal injuries sustained in a collision at a grade crossing in the city of East St. Louis. The declaration consisted of three counts; the first charged negligence, generally, in the operation of the train; the second, a violation of a city ordinance limiting the speed of passenger trains to ten miles per hour; the third, a violation of an ordinance requiring that the bell of each locomotive shall be rung continuously while running within said city. Each count averred that defendant in error while in the exercise of ordinary care for his own safety was injured by and through the negligence aforesaid.

To the declaration the general issue was filed and also a special plea to the effect that defendant in error at the time of the accident, was employed as chauffeur for John Collins, who was then and there engaged in carriage by land and loading and unloading in connection therewith. That defendant in error was then and there engaged in that work and that plaintiff in error, at the time of the accident, was also engaged in the same kind of business; that by reason of the premises and the Workmen's Compensation Act defendant in error could not recover in this action.

To the special plea defendant in error replied that, at the time of the accident, he was not engaged in the capacity of a chauffeur for the said John Collins, or any other person or corporation, and was not operating under or subject to the said Compensation Act; that plaintiff in error was engaged as a carrier of Interstate Commerce and was not operating under the said Act.

The railroad track of plaintiff in error and several other tracks cross Missouri Avenue a short distance south of the Relay Depot in East St. Louis. Missouri Avenue runs east and west and the tracks approach and cross over it from the southwest and extend in a northerly or northeasterly direction beyond the crossing. From the Eads bridge the track curves to the northeast and there is a steep down grade from

the bridge to Missouri Avenue. Two flagmen are stationed at the crossing, one at the east side, the other at the west. At the southwest corner of the intersection is located a flagman's shanty which is about ten feet from the south side of the street and about twenty feet west of the westerly track. This shanty was about 12x14 feet and about 11 or 12 feet high. Another building stood just west of it of about the same dimensions and height which was owned and used by the Western Union as a battery house. It will be observed that this was an unusually dangerous crossing.

At about 5:15 p. m. on the day in question, defendant in error approached this crossing from the west driving a motor truck loaded with cattle. The evidence tends to show that he stopped his truck in front of the flagman's shanty and waited for an engine and cars to pass south and another engine and cars to pass north over the crossing. There is a conflict in the evidence as to whether the flagman was at his post and gave any signal or warning prior to the collision. There is also the usual conflict as to whether the bell was ringing and as to the rate of speed of the train. Defendant in error testified that he waited at the crossing for 15 or 20 minutes, that no flagman was in sight and that after the two trains passed over the crossing he started to cross and received no stop signal and that while crossing the engine struck the truck about the middle of the chassis.

It is contended by plaintiff in error that the trial court erred in refusing to direct a verdict of not guilty, but, in the state of the proof, it is our opinion that the questions of negligence and contributory negligence were matters to be determined by the jury. In that connection it is also contended that the peremptory instruction should have been given because the evidence showed that defendant in error was in the employ of John Collins, who was under the Compensation Act and that plaintiff in error was also under that Act.

In view of the fact that the train had just come from St. Louis, Missouri, and was to pass through Illinois and Indiana, plaintiff in error was engaged in interstate commerce and was not subject to the Workmen's Compensation Act. Goldsmith vs. Payne, 300 Ill., 119.

Plaintiff in error contends that there is no evidence to sustain the charges of negligence. There was a conflict in the evidence as to whether the bell was ringing and as to the rate of speed. The weight and credit to be given thereto was for the jury and we are not prepared to say that their conclusion in that regard was so manifestly wrong that the verdict and judgment should be set aside.

The first count of the declaration charged negligence, generally, in the operation of the train, and plaintiff in error joined issue thereon. Such a count, in an action against a street car company, was tested on special demurrer and held good. Chicago City Ry. Co., vs. Jennings, 157 Ill., 274. In that case it was contended that such a count should not be held proper in a case against a street car company, the cars of which move upon fixed rails and within a prescribed track, so as to be unable to get out of the way by turning to the right or left.

In answer to that contention the Court said: "We do not

regard the distinction as well founded. The driver of the grip-car must be governed by established rules. He must know how to manage the motor; he must not drive it at an unreasonable rate of speed; he must keep a reasonably careful look-out ahead; he must respect the equal rights of others to the use of the public streets. How can the pleader know exactly what caused the failure of the company's servants to properly drive and manage the motor-car?"

In the case at bar the engineer in charge of the train testified that there is a heavy down grade from the river to Missouri Avenue crossing and that there is a semaphore about 50 feet south of the crossing. He said that before reaching that semaphore he had the train down to about 12 or 15 miles per hour; that from his position on the engine he could not see the semaphore nor a person approaching the track from the west; that when he was about 15 feet from the semaphore and 65 feet from the crossing the fireman informed him that the semaphore was clear; that he then released the brakes and was going 6 or 8 miles an hour as he passed under the semaphore; that soon after releasing the brakes he got word from the fireman to stop and that he then threw the brake lever in an emergency position, but did not get an emergency application of the brakes because the automatics had not had time to recharge after releasing the brakes.

The fireman, who was on the side of the engine where he could see defendant in error after the latter passed beyond the flagman's shanty towards the tracks, testified on behalf of plaintiff in error, but was not asked as to when he first saw defendant in error, nor as to whether he told the engineer the semaphore was clear, nor as to whether he told the engineer to stop before the collision. The only fact testified to by the fireman of any importance was that he couldn't say for sure whether the bell was stopped ringing between Washington Avenue in St. Louis, Missouri, and the place of the collision.

We are inclined to think that the jury was justified in finding, under the evidence of the engineer and fireman, that there was negilgence in the operation of the train as it approached this crossing. The engineer knew that he was on a heavy down grade and that if he released the brakes when 50 or 60 feet from this dangerous crossing he could not thereafter, immediately procure an emergency application of the brakes before reaching the crossing should it become necessary to stop. He could not see one approaching from the west and plaintiff in error failed to interrogate the fireman as to whether he saw defendant in error before the collision.

It is argued that defendant in error was guilty of contributory negligence, but under all the facts and circumstances disclosed by the evidence it was a question of fact for the jury. There is an assignment of error to the effect that the verdict is excessive but as no argument is presented it must be held to have been waived. While the verdict is large no question is made as to the injuries being of a very serious nature.

At the close of the evidence for defendant in error a motion for continuance was made by plaintiff in error on the ground that he was surprised at the testimony of the defendant in error that he was a partner of John Collins; that said Collins, if present, would testify that defendant in error was

his servant and employee and not a partner; that subpoena was issued for said Collins after defendant in error testified but that said Collins was in another county and could not be served in time. The replication to the special plea informed plaintiff in error that defendant in error denied that he was a servant of the said Collins. No diligence was shown to procure the attendance of Collins at the trial and the Court properly overruled the motion for a continuance. The evidence was not material because plaintiff in error was not under the Compensation Act.

The Court did not err in its modification of the fourth instruction given for plaintiff in error. The portion eliminated was calculated to lead the jury to believe that defendant in error was required to exercise more than ordinary care. The fifth instruction was erroneous and should have been refused, but the Court modified and gave it. It should not have been given as modified. The portion that was stricken was proper, but was included in the second and third given instructions. Th eighth instruction was refused, but as it did not materially differ from the second and third given instructions it was properly refused.

As we find no reversible error in the record the judgment is affirmed.

Affirmed.

Not to be reported in full.

Term No. 36 Agenda No. 9

IN THE
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

OCTOBER TERM, A. D., 1921.

THOMAS A. BLAZIER,
Appellant.
vs.
CALLOWAY N. STREEPER, et al.,
Appellees.

Appeal from
City Court
Of Alton.

Opinion by Barry, J.

Appellant repaired a certain automobile for one W. T. Davies and had possession thereof and was entitled to a common law lien thereon.

Appellees began a suit against the said Davies in attachment before a Justice of the Peace. The purported affidavit for attachment was signed "Streeper & Sons" but no Jurat was attached. It did not name the defendant otherwise than as "Davies" and many of the blanks were not filled in. The affidavit was wholly insufficient to give the Justice jurisdiction, yet he rendered judgment and issued a special execution for the sale of the car. Mr. Davies was a non-resident and did not appear in the Justice Court.

When the constable received the execution he demanded the car from appellant who refused to let it go until he was paid the amount of his lien. Thereupon the constable arrested appellant on a charge of resisting an officer and was fined $8.75 and given to understand that he would be again arrested if he did not deliver possession of the car.

The constable made a pretended sale of the property to one of appellees for $400.00 and the purchaser gave the Justice of the Peace a check for $183.00 which was the difference between the purchase price and the amount of appellees' bill against Mr. Davies. The sale was void and the purhaser acquired no title to the car.

Appellant filed a bill in Chancery against appellees setting up the foregoing facts and asked the Court to declare that he had a paramount lien and prayed the Court to decree that appellees pay to him the full amount of his lien and interest from date of sale and that they refund to him the amount of the fine.

Appellees answered the bill and among other things set up that appellant had an adequate remedy at law. On the hearing the Court dismissed the bill for want of equity and appellant has appealed to this court.

Where there is a statutory lien, but the legislature has failed to provide a remedy for its enforcement, resort may be

had to a Court of Equity for that purpose. But a common law lien is a mere right to retain property until a demand is satisfied and the property can not be sold by the lienholder except by agreement or under a statute authorizing a sale, 19 Am. & Eng. Enc. 34; 25 Cyc. 681; 13 Enc. P. & P. 123, 126.

A common law lien does not confer a right of sale either at law or in equity. The right of possession is all that such lien secures, which may be maintained by proper suit at law until the right of sale has been acquired either under execution or attachment, Burrough vs. Ely, 54 W. Va., 118.

If the lienor is wrongfully deprived of his possession, he can maintain replevin for the goods, or trover and conversion for their value to the amount of his claim, Burrough vs. Ely, *Supra;* 13 Enc. P. & P. 126; 19 Am. & Eng. Enc. 35. A bill in chancery will be dismissed where replevin is the proper form of action to redress the alleged wrong, Thompson vs. Vernay, 106 App., 182.

Appellant did not, by his bill or evidence, establish such a case as would call into action the equitable powers of a Court of Chancery. Under the authorities he had an adequate remedy at law and the Court did not err in dismissing his bill for want to equity, and the decree is affirmed.

Affirmed.

Not to be reported in full.

Term No. 42 Agenda No. 32

IN THE
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

OCTOBER TERM, A. D., 1921.

FRED FRENCH, Appellant.
vs.
MELVIN JOHNSON, et al. Appellees.

Appeal from White County Circuit Court.

Opinion by Barry, J.

Appellee Johnson owned a 200 acre farm in White County, Illinois, and in 1909 moved to South Dakota where he lived until after the transactions in question, never having been back to this state. On March 12, 1915, he gave Phillip King authority in writing to sell his farm for $100.00 per acre but there was a mistake in the description of the premises. On April 28th, 1919 Mr. King, as agent of Johnson, entered into a written contract with appellant to convey to the latter the Johnson farm by proper description.

When the sale was reported by King to Johnson the latter refused to recognize it in any way and deeded the premises to his friend, appellee Stewart, who came to Illinois and sold and conveyed the permises for $115.00 per acre to Charles A. French, appellant's brother, and who had acted as agent for appellant in the purchase of the land and the making of the contract with Phillip King as agent for Johnson.

Before Charles A. French entered into the contract with King on behalf of appellant, he asked for and was shown the written authority which Mr. King held from Johnson, and which was dated March 12, 1915. So that appellant's agent who was authorized to make the contract for appellant was aware of the terms of the contract between King and Mr. Johnson before the contract, under which appellant claims to have bought the land, was entered into.

Between March 1915 and April 28th, 1919, the date of appellant's contract with Mr. King as agent of Johnson, land in White County, Illinois, has greatly increased in value and was still rising rapidly. Charles A. French and Mr. King knew that fact very well, in fact, Mr. French says that when he made the contract for appellant the land in question was reasonably worth from $125.00 to $175.00 per acre. There is no evidence in the record that Mr. King reported to Mr. Johnson that land had risen in value and was still going up.

When Charles A. French bought the land from Mr. Stewart the purchase money was deposited in the bank at Grayville,

Illinois, and thereupon appellant brought this suit, not for specific performance, but for the purposes of tying up the money so as to collect damages from Johnson. It was later discovered that the Johnson land was not properly described in the agency contract between Johnson and King and appellant amended his bill by alleging the error in that regard and praying for a reformation thereof.

Upon a hearing the Court entered a decree dismissing the bill as amended for want of equity. If an agent authorized to sell land at a given price, three years after, when the value has greatly advanced and is rapidly rising, sells the same at the price named, and at a great sacrifice, without informing his principal of the rise in value, this will be such a fraud upon the principal, as that a Court of Equity may refuse to enforce a conveyance to the purchaser, Proudfoot vs. Wightman, 78 Ill., 553.

In the case at bar Charles A. French, Appellant's brother and agent, saw Mr. King's authority and knew that land had greatly advanced in value and was rapidly rising and accepted a contract from King who had received his authority four years' previously. When Mr. Johnson learned of the sale by King he promptly repudiated it.

It looks very much as if Charles A. French appellant and King then entered into collusion to have Charles A. French purchase the land from Stewart and tie the money up in the bank in the hope that appellant might collect damages for a breach of the contract. To reform the authority given by Johnson to King in 1915 and permit appellant to recover damages from Johnson under the evidence in this record would be "contrary to law and abhorrent to reason and justice."

The decree is affirmed.

Affirmed.

Not to be reported in full.

Term No. 53. Agenda No. 21.

IN THE APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

OCTOBER TERM, A. D., 1921.

NELSON PAGE, by &c.,
Appellee.

vs.

JAMES C. DAVIS, Director General of Railroads,
Appellant.

Appeal from
Marion
Circuit Court.

Opinion by Barry, J.

Appellee recovered a judgment for $1,000.00 for personal injuries alleged to have been caused by the negligence of appellant while he was in the exercise of ordinary care for his own safety.

Appellee's father was employed by Wayne Sawyer to load a box car with staves. On June 14, 1919, a certain car was on the house track at Salem, Illinois, and the station agent told him to load that car, and he began the loading. A Mr. Davis hauled the staves to the car and Appellee and his two brothers and Mr. Phelps assisted the elder Page in piling up the staves in the car. Appellee was then nine years of age. While at work in the car an engine attached to other cars came in on the house track and bumped into the car in which appellee was at work. The staves which were piled four or five feet high were thrown down by the collision and upon appellee, who was also thrown on the floor of the car. The evidence tends to show that there was a fracture of one of the bones of the foot.

There is some evidence tending to show that a servant of appellant notified those in the car that a train was coming. On the part of appellee there was much testimony that no warning of any kind was given by appellant's servants of the approach of the train and there is testimony that on previous occasions appellant had always given notice to persons working in a car when a car was to be moved.

The brakeman who claimed that he told the parties in the car that a train was coming in and to see that there was no one on the other side of the car, also testified that the coupling of the train to the car in question was made as easily as a man could make it with a freight train. Impeaching evidence was offered by appellee to the effect that this witness said: "Don't blame us. It was the damned engineer's fault. He didn't pay any attention to our signals." The brakeman did not deny that he made the statement but simply said he

did not remember what he said at that time. The engineer did not remember anything about the coupling.

The brakeman who assisted in making the coupling knew for some time before it was made that the parties were in the car piling up the lumber. Under the state of the proof the questions of negligence and contributory negligence were questions of fact for the jury unless appellee was merely a licensee or trespasser as contended by counsel for appellant.

Counsel cite no authority in support of their contention in that regard and we are inclined to the opinion that such contention can not be sustained. I. C. R. R. Co. vs. Hoffman, 67 Ill., 287; C. & N. W. Ry. Co. vs. Gobel, 119 Ill., 515; C. & E. I. R. R. Co. vs. Burridge, 107 App., 23. See also note in 31 L. R. A. (N. S.) 960

Appellant contends that the first instruction given for appellee is erroneous. Subsequently the same instruction was complained of in a similar case but it was approved by this court, C. & E. I. R. R. Co. vs. Burridge, 107 App. 23, and by the Supreme Court, 211 Ill., 9-16.

We have carefully considered the objections to appellee's second, third and fourth given instructions and are of the opinion that they are not well founded. The fifth is objected to on the ground that it authorized appellee to recover for loss of time and inability to work. The suit was brought in the name of appellee by his father as next friend and the objection is fully answered in American Car Co. vs. Hill, 226 Ill., 227.

The fifth instruction related solely to the measure of damages and did not authorize a recovery for anything except what the jury should find to have been proven by the evidence and is not subject to the other objections urged against it.

While there may be error in some of the rulings in the admission of medical testimony, yet, in view of the amount of the verdict we are of the opinion that the error is not such as to require a reversal nor would we be justified in holding that the verdict is excessive.

We are of the opinion that the jury was fully and fairly instructed and that no reversible error was committed in the rulings on the admission or exclusion of evidence.

The judgment is affirmed.

Affirmed.

Not to be reported in full.

Term No. 59. Agenda No. 48.

IN THE APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

OCTOBER TERM, A. D. 1921

FIRST NATIONAL BANK OF TRENTON, N. J.,
Appellee.
vs.
SANDOVAL ZINC CO.,
Appellant.

Appeal from Marion Circuit Court.

Opinion by Barry, J.

Appellee sued in assumpsit and recovered a judgment based on a trade acceptance which was executed in the name of appellant by its president. By agreement the case was tried before the Court without a jury. No propositions of law were submitted by either side. In that state of the record this and other Appellate Courts have frequently said that it will be presumed that the trial court correctly applied the law to the facts. That conclusion was based upon decisions of the Supreme Court in cases reaching that Court through the Appellate Court. It has lately been decided that it is the duty of this Court to pass both upon the facts and the law though no propositions of law were held or refused by the trial court. P. C. C. & St. L. Ry. Co. vs. Chicago Railway, 300 Ill. 162.

Appellant contends that the instrument was executed solely for the accommodation, or as surety for another corporation, and, by reason thereof, it was **ultra vires** and appellee was not entitled to recover. According to the prevailing and more reasonable doctrine, even though it is ultra vires of a corporation to make, indorse or accept commercial paper for the accommodation of another, yet such paper is enforceable in the hands of a **bona fide** holder thereof for value and without notice of its accommodation character, if the corporation has power, under any circumstances to issue, indorse or accept negotiable paper; 17 R. C. L. 603; Daniels Neg. Insts. par. 386; Central Trust Co., vs. S. & K. Machine Co., 191 App. 613; Cox & Sons Co. vs. Northampton Brg. Co., 245 Pa. St. 418; 8 Corpus Juris 780.

The execution of the instrument, as well as the authority of the president of appellant to execute it, was denied by verified pleas. For that reason counsel contend that the Court erred in admitting it in evidence without sufficient proof in that regard. There is no dispute in the evidence of the fact that it was executed in the name of appellant by its president. It was executed on March 22, 1920, and was payable three days later.

On March 26th, 1920, the next day after it was due and

while it was in the hands of the First National Bank of Sandoval, Ill., for collection, appellant, by its secretary wrote a letter to that bank in which appellant clearly recognized the validity of the instrument by enclosing Chicago Exchange for $4742.09 and an order payable to appellee on the M. M. S. Metal Co., for $220.19 to be received by appellee in full settlement.

On June 23, 1920, appellant, by its secretary, again wrote the said bank recognizing the validity of the instrument in question, but claiming there should be a deduction of $333.69. In view of those letters we are constrained to hold that there was ample evidence to show that appellant ratified the transaction and it must be presumed that its president had authority in the first instance to execute the instrument. There being no reversible error in the record the judgment is affirmed.

Affirmed.

Not to be reported in full.

Term No. 17 Agenda No. 23

IN THE APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

OCTOBER TERM, A. D. 1921

FANNIE M. VAN VELSON, Administratrix of the Estate of Alonzo G. Van Velson, Deceased
Plaintiff in Error.

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, a Corporation,
Defendant in Error.

Error to Circuit Court of Jefferson County.

Opinion by Boggs, J.

Plaintiff in error, hereinafter called plaintiff, brought suit in the Circuit Court of Jefferson County, as administratrix, to recover damages for the death of her husband, Alonzo G. Van Velson, who was killed on the tracks of defendant in error, hereinafter called defendant, between Centralia and Woodlawn on October 6, 1917. A trial was had before a jury and at the close of plaintiff's evidence, on motion of the defendant, the Court directed a verdict of not guilty. Judgment was rendered thereon in bar of action and for costs. To reverse said judgment this writ of error is prosecuted.

The record discloses that about four o'clock on the afternoon of the day in question plaintiff's intestate, who was employed by defendant as a station agent at Woodlawn, having completed his work for the day, obtained permission of a Mr. West, signal supervisor of defendant railroad company, to accompany him from Woodlawn to Centralia; the trip was made on a small gasoline motor, known as a "Speeder." Upon reaching Centralia, the Speeder was placed in a shed on the defendant's premises. West stayed in Centralia, but permitted plaintiff's intestate to use said speeder for the return trip to Woodlawn. The record does not disclose the time when Van Velson left Centralia but from the testimony in regard to when the accident occurred it must have been between seven and eight o'clock that evening. The defendant railroad company has double track from Centralia to Woodlawn. The west track is generally used for its south bound trains and the east track for its north bound trains. Van Velson, on the evening in question, was proceeding to Woodlawn on the west or south bound track. While on the way, a work train coming from the south struck the speeder, threw it from the track, and Van Velson was found dead, lying some twenty feet west of the track.

The declaration, consisting of two counts was filed on October 4, 1918, just two days before the statute of limitations had run. The first count alleges that plaintiff's intestate was in the employ of the defendant, and that, "while in the per-

formance of a duty under his said employment, was riding on a railroad motor car, commonly called a "speeder," was struck by a train of defendant company and killed. The negligence averred being that there was a double track from Centralia to Woodlawn, and that the westerly track was used by southbound trains; that plaintiff's intestate, at the time of his injury, was driving the speeder south on the southbound track, and that the defendant, through its servants, negligently and carelessly caused the train in question to go upon and along the said southbound track. It is also averred that the locomotive pulling said train was being run at a high rate of speed, without light to warn of its approach.

The second count averred that, with the knowledge and consent of defendant, plaintiff's intestate had, at divers times rode up and down the track from Woodlawn to Centralia; that on the day in question he accompanied one West, alleged to be a signal supervisor, on a motor car, commonly called a speeder; but that under the instructions and directions of West, in the performance of his duties as such superintendent, the deceased took said speeder on his return trip from Centralia to Woodlawn, and while traveling south on the westerly track of defendant, he was met and struck by a train of defendant.

Said count also charges a failure to have a proper headlight, the running of said train at a high and dangerous rate of speed on the south bound track instead of the north bound. Both of said counts allege due care on the part of plaintiff's intestate.

A demurrer filed to this declaration was sustained by the Court. The amended declaration, consisting of three counts, was filed January 23, 1920. The first count thereof alleges facts substantially as in the original declaration, with the exception it failed to aver facts showing the relationship of master and servant. The second count of the amended declaration averred, among other things, that Van Velson was using the speeder with the knowledge and permission of the railway company and that while driving the same south on the westerly track, the defendant carelessly and negligently ran its train northerly on the southbound track. The third count of the amended declaration, in addition to the facts alleged in the first and second counts, averred that the defendant, without notice or warning to the deceased, operated said train in a northerly direction on the west or southbound track of defendant company, at a high and dangerous rate of speed, with a dim coal oil headlight, and that such conduct on the part of defendant company was wanton and wilful and that the same resulted in the death of plaintiff's intestate. To the amended declaration the defendant filed the general issue and three special pleas.

The first and second special pleas are to the effect that the supposed cause of action in the amended declaration mentioned did not accrue within one year next before the filing of the same.

The third special plea averred that said cause of action did not accrue within two years next before the filing of the amended declaration.

The plaintiff thereupon obtained leave to file another ad-

ditional count. This count averred the operation of the locomotive without a headlight, in violation of a Federal statute. Said pleas were refiled to the amended declaration and to the additional count. The plaintiff thereupon demurred to the three special pleas. On motion of the defendant, the demurrer was carried back and sustained as to the additional count. The demurrer was also sustained to the second and third special pleas. Said cause went on trial on the amended declaration, the plea of general issue, and a special plea setting up the one-year statute of limitation, in bar of action.

It is contended by counsel for plaintiff that the original declaration stated a cause of action defectively and that the amended declaration did not state a new or different cause of action and that, therefore, the plea of the statute of limitations did not apply. On the other hand, counsel for defendant contend that the original declaration failed to state a cause of action; that the amended declaration stated a new and different cause of action and that, therefore, said cause of action was barred by the statute of limitations. It is further contended by counsel for defendant that without reference to the plea of the statute of limitations no right of recovery was shown by the evidence. The original declaration not being based on the violation of any federal statute and being based on the relation of master and servant, no cause of action was stated by said declaration by virtue of the compensation act of this state.

The amended declaration on which the trial was had attempted to state a new and different cause of action not based on the relation of master and servant; it was, therefore, barred by the statute of limitations. We hold, however, aside from the question of whether or not the amended declaration stated a new cause of action, and as to whether or not said cause of action was barred by the statute of ilmitations, that on the merits of this case, the record discloses no right of recovery. The most that can be claimed for plaintiff's intestate in making use of the tracks of defendant company on his return from Centralia to Woodlawn was that he was a mere licensee. Under the law of this state a railroad company owes no duty to a licensee using its tracks other than not to wantonly or wilfully injure him. Pauckner v. Wakem, 231 Ill., 276-279; Milauskis v. Term. R. R. Assn. 286 Ill., 547-555.

Cunningham v. T. St. L. & W. R. R. Co., 260 Ill. 589, 594.

James v. I. C. R. R. Co., 195 Ill. 327-334.

In Milauskis v. Term. R. R. Assn. supra, the Court, on page 555, says: "Permission involves leave and license, but it gives him no right. The permission or license is a justification for his entry, and while he is not technically a trespasser, yet the duty of the owner to guard him against injury is governed by the rules applicable to trespassers."

It was further contended by plaintiff that defendant railroad company was negligent in operating its train in question in a northerly direction on the west track which was usually used for its south bound traffic. The defendant railroad company had the right at all times to run its trains in either direction on either of its main tracks and the running of the north bound train on the westerly track was not in and of itself negligent. Lake Shore & M. S. R. R. Co. v. Hart, 87 Ill. 529, 534.

A person has no right to assume that a track will be used only for trains running in a certain direction because customarily used only for such trains. Belt R. R. Co. v. Skszpczak, 225 Ill. 242.

It is further contended by plaintiff that it was wilful and wanton negligence for the defendant to operate its train at a high rate of speed without having a headlight on its engine of the character specified by statute. Under the law of this state a railroad company owes the trespasser or licensee no duty to ring a bell or sound a whistle or provide for a certain type of headlight, as these warnings are for the benefit of those who are about to cross the tracks at public crossings. Roden v. C. & G. T. Ry. Co. 133 Ill. 72. C. R. I. & P, Railway Co. v. Eininger, 114 Ill. 79.

It is further contended by plaintiff that the engineer on the train in question saw a red light on the speeder in question in time for him to have stopped his train and that his failure to so stop it constituted wilful and wanton negligence. The testimony of said engineer was to the effect that some two hundred feet south from where the accident occurred, he saw a flash of red light; that it want out and he saw it again;; that he immediately took hold of the throttle of his engine but that as he did not see the light again he did not stop the engine. We do not think that the evidence is of such character as would require the engineer to stop his train. This was at a place between crossings and according to the testimony of the engineer, there was not sufficient warning given him to require that he attempt to stop his train.

Finding no error in the record, the judgment of the trial court will be affirmed.

Judgment affirmed.

Not to be reported in full.

Term No. 18 Agenda No. 14

IN THE
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

OCTOBER TERM, A. D. 1921.

W. T. CARR,
Appellant.
vs.
WILLIAM CONRAD,
Appellee.

Appeal from
Circuit Court of
Clinton County, Ill

Opinion by Boggs, J.

Suit was brought by appellant against appellee for commission alleged to be owing on the sale of a farm owned by appellee and his brother, Fred Conrad. The declaration as filed contained one special count and the common counts. The special count was held bad on demurrer, leaving the common counts. Appellant filed a plea of the general issue and a special plea to the effect that the contract sued on had been obtained by fraud and circumvention. A trial was had resulting in a verdict for appellee, on which judgment was rendered in bar of action and for costs. To reverse said judgment this appeal is prosecuted.

While several causes of error were assigned, the only assignment of error argued by appellant is that the verdict is against the manifest weight of the evidence.

The record discloses that appellant is a real estate broker and resides at Trenton, Illinois. Sometime in the month of December 1918 appellee and his brother, Fred Conrad, who were owners of a farm in Clinton County were in appellant's place of business when the latter suggested it was the time to sell their farm. The Conrads manifested a willingness to sell their farm and something was said about their coming back in a few days and entering into an agreement for its sale through appellant, as agent. Fred Conrad did not return but departed for his home in Chicago. On December 30th, 1918, appellee signed an agreement authorizing appellant to sell or find a purchaser for the farm, stating that the title was in appellee and Fred Conrad, the price to be $90. per acre "unless he shall agree to less." The commissions to be paid were four per cent.

Appellant testified that he signed the agreement with the express understanding that he was not to be bound by the same unless the terms were agreeable to his brother Fred. Soon thereafter appellee wrote appellant stating that his brother Fred would not give four per cent for selling the farm "so you can cancel it all off." Following this several letters passed

between appellant and appellee which it is not necessary to set out or comment upon. On March 24, 1919, appellee wrote appellant as follows: "Your letter of the 19th was received and also one from Fred. I sent him your first contract, but he did not forward it to you. He gave me the understanding that the $88.20 per acre was a contract some years ago and has expired a long time since and that we spent $275. since we were down there for this year and says it will have to bring $90. per acre and one half of the rent for this year, that is, he says $90. per acre for us and you set your price above $90. per acre so as to give you your commission and no rent after May 1, 1919, and we will not lease it after June 1. He says the renters don't like to see someone looking the place over all the time. so he don't care to have it listed any longer. I can't make him sign a contract where he is not satisfied and I am not very much interested in writing to him about it as I would like sooner you write him yourself. (Signed) William Conrad."

On receipt of said letter appellant wrote appellee a letter enclosing the following contract for appellee and his brother to sign: "We hereby authorize W. T. Carr of Trenton, Illinois, to sell the following described farm (legal description) the net price to said W. T. Carr shall be $90. per acre."

In the letter accompanying said proposed contract appellant stated: "I hope you will see your way clear to sign this contract without any restrictions and forward the same to Fred for his signature and have it returned to me immediately." Receiving no reply to this letter, appellant on April 4, 1919 telegraphed appellee stating that he had sold the farm. Following the telegram appellant sent a deed of conveyance of said farm to appellee to be signed by him and his brother, Fred. Said deed stated nothing about the rights of the tenant or any lease.

Appellee signed said deed and sent it to his brother Fred in Chicago who refused to sign it. Later the Conrads sold the farm to the party that appellant claims he had as a purchaser.

Appellant bases his rights of recovery on the letter of March 24, 1919, which is set out in this opinion. Appellant insists that he was authorized by said letter to sell the farm at $90. per acre net to appellee and his brother; and that he found a purchaser for the same and was therefore entitled to a commission of $400.

There is no showing that there ever was a valid agreement between said parties. The original agreement signed on December 30th, 1918 was later revoked by letter written by appellee, dated Feb. 4, 1919. The evidence also shows that appellant abandoned said agreement and sought to obligate appellee and his brother through further correspondence. We also hold that the letter of March 24, 1919, does not constitute a contract for the reason the evidence is to the effect that any agreement entered into betwen appellant and appellee was not to be binding unless satisfactory to appellee's brother, Fred. All the letters written by the appellant and especially the subsequent agreements which he sought to have executed show that he was still endeavoring to get a contract signed by both appellee and his brother Fred and was not relying on appellee's letter of March 24, 1919.

An examination of the correspondence between said parties will disclose that the deed sent by appellant was not draft-

ed according to the requirements which Fred had outlined to appellee and which was stated by appellee as a condition for the selling of said farm, no mention being made of the lease on said premises.

For the reasons above stated we hold that the verdict of the jury is not against the manifest weight of the evidence. We would therefore not be warranted in reversing the judgment for that reason. U. S. Health and Acc. Ins. Co. v. Phelan, 135 App. 399; City of E. St. Louis v. Mahoney, 77 App. 574.

Errors assigned and not referred to in appellant's argument are under the rules of this court deemed waived.

There being no reversible error in the record the judgment of the trial court will be affirmed.

Judgment affirmed.

Not to be reported in full.

Term No. 19 Agenda No. 5

IN THE APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

OCTOBER TERM, A. D. 1921

NICHOLAS UMFLEET,
Appellant.
vs.
THOMAS SEED,
Appellee.

Appeal from
Circuit Court of
Lawrence County.

Opinion by Boggs, J.

An action on the case was instituted in the Circuit Court of Lawrence County by appellant against appellee to recover for injuries received when struck by an automobile driven by appellee. The declaration as amended charges general negligence in the operation of said automobile and a failure to give proper signals, etc. To this declaration a plea of the general issue was filed, and a trial was had, resulting in a verdict in favor of appellee. A new trial was denied and judgment was rendered against appellant, in bar of action and for costs. To reverse said judgment appellant prosecutes this appeal.

Appellant was a painter and resided in the city of Bridgeport. About twelve o'clock, May 7, 1920, appellant and a man named Helm had left their work at the edge of town and had started up town. Soon after two young men referred to in the evidence as the Botzer boys came along in a Ford truck. Appellant and his companion got into the truck. Appellant sitting in the rear thereof with his feet hanging out. The truck proceeded south on Church street after entering the town until it reached Winkler street, which street intersects Church street at right angles. The truck then pulled up near the west side of Church street and either stopped or slowed down almost to a stop. Helm then got out of the truck on the west side, stepping from the car to the curb, and appellant got off the truck on the east side at the rear. Appellant stepped into the street a few feet toward its center, his back being turned toward the north. He stopped to speak a few words to the Botzer boys, who were in the front seat of the truck, when appellee, who was driving a Buick seven passenger touring car, came up from the rear, struck appellant, knocking him down, the wheels of the car running over his legs below the knees.

The only ground urged by appellant in his brief and argument for a reversal of the judgment in this case is the ruling of the Court on the instructions. It is contended by appellant that the first instruction given in behalf of appellee is erroneous. Said instruction being as follows: "The Court instructs

the jury that if you believe from the evidence that the plaintiff, in alighting from the automobile, failed to exercise the ordinary care and caution which a reasonable, prudent man would exercise under like circumstances, and that such negligence on the part of the plaintiff contributed proximately to the injury suffered by him, he cannot recover in this suit."

This instruction states a correct principle of law and is applicable to the facts. The Court did not err in giving same.

Complaint is made of instructions three, five and six, given for appellee. Instruction number three is not as carefully drawn as it should have been, but there is no substantial objection thereto. All of said instructions complained of state correct principles of law applicable to the facts. The Court did not err in its rulings thereon.

Appellant next contends that the Court erred in refusing instructions offered by him which he claims were correct in principle and applicable to the facts in the case.

While apellant contends these instructions should have been given he does not point out wherein the Court erred in their refusal. The language used by appellant being: "We further contend that because of the Court's refusal to give a large number of instructions on behalf of the plaintiff, the jury were ignorant of the duty and obligations which the law imposes upon persons using the highways."

Instructions numbered two, three, eight, nine, eleven, thirteen and sixteen are abstract in form and their tendency would have been to mislead the jury. Instructions numbered four, ten and fourteen are erroneous in that they all direct a verdict without including the element of due care on the part of appellant just prior to and at the time of the accident. Appellant's instruction number five is as follows "The Court instructs the jury that the failure of a pedestrian to look and listen before crossing a street is not under all circumstances a failure to exercise ordinary care, and if you believe from the evidence in this case that the plaintiff was exercising such care, as an ordinary prudent person would exercise under all circumstances, and you further believe from the evidence that the defendant failed to use every reasonable precaution to avoid injuring the plaintiff, then you should find your verdict in favor of the plaintiff." This instruction is not properly guarded and to have given same would have had a tendency to mislead the jury.

Appellant's refused instructions six and seventeen do not state correct principles of law. The Court did not err in refusing the foregoing instructions offered by appellant.

The Court gave six instructions for appellant which sufficiently stated appellant's theory of the case, so far as that theory coincided with the law.

There being no substantial error in the record, the judgment of the trial court will be affirmed.

Judgment affirmed.

Not to be reported in full.

Term No. 24 Agenda No. 29

IN THE APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

OCTOBER TERM, A. D. 1921

EDWARD GILMORE,
Appellee.
vs.
CARL WINKLER,
Appellant.

Appeal from
Circuit Court
Effingham County
Illinois.

Opinion by Boggs, J.

An action on the case was brought by appellee against appellant in the circuit court of Effingham County, seeking to recover damages for personal injuries alleged to have been suffered by appellee at the hands of appellant. The declaration, as finally amended, consisted of two trespass counts. To this declaration appellant filed a plea of the general issue and three pleas of justification. To the special pleas appellee filed a replication de injuria.

A trial was had before a jury resulting in a verdict in favor of appellee for the sum of $2450. A motion for a new trial made by appellant was overruled by the Court and judgment was rendered against appellant for said amount and costs. To reverse said judgment this appeal is prosecuted.

The record discloses that appellee and appellant lived about a half a quarter of a mile apart on an east and west road in said county. On the 14th day of October, 1920, appellee had gone to the field for a load of fodder and was returning with the same and had come from the south to the north on a highway intersecting the east and west road on which appellee and appellant resided. He had turned west on said east and west road which run by appellant's house. Appellant had observed appellee coming and had gone to the road and waited until he drove up. Said parties greeted one another, and thereafter the evidence is conflicting as to just what took place. Appellee testified to the effect that just about the time he got even with appellant's barn he saw appellant coming towards the road, and that he walked right in front of appellee's team, taking one of the horses by the bit and stopped it. Appellee further testified that appellant asked him what he, appellee, had told that lie on appellant for? Appellee testified that he was seated on the fodder at the time and replied that he had not told any lie on appellant. Appellee testified that he then asked appellant if he didn't tell "this stuff" himself, and that appellant replied, "No, you dirty liar, I did not." Appellee states that appellant was then coming toward him

and that he went to step off the wagon and just as he got the weight of his left foot on the ground appellant ran up and kicked him on the leg, and that he fell to the ground. He also testified to the effect that appellant hit him twice on the back of the head with his fist and choked him.

On the other hand, appellant testified that after greeting appellee, he inquired of appellee, "What do I owe you for threshing?" That appellee then got up, wrapped his lines around the ladder at the front of the wagon, reached for his corn knife and said, "I will show you threshing." That there was then some conversation between appellee and appellant, and that appellee struck at him with the corn knife. Appellant further testified that the then said to appellee, he didn't want to have any trouble and that if he went around making threats he (appellant) would have to have him placed under a peace bond; appellee thereupon raised the corn knife above his head and said, "You damn son-of-a-bitch, when I get through with you, there won't be enough left of you to put me under a peace bond." Appellant further testified that at the time appellee said this, he was going to the back end of the wagon and that appellee, in running back along the hay rack, stumbled and fell onto the ground; that the corn knife fell out of appellee's hand toward appellant and that he, appellant, kicked the corn knife out of appellee's reach. Appellant further testified he put his left hand on the right hand of appellee and his right hand on his throat and held him down, and said to him, "If you will behave yourself, I will let you up and you can go home." Appellee said, "I will give up, I think my leg is broken, you kicked me." Appellant thereupon said he did not kick him, "you tumbled off the wagon and broke your leg."

No one saw what took place at the time appellee's leg was broken. Appellee was removed to his home by a party who came along shortly after the altercation took place. The leg was set, but for some reason did not heal properly; it was badly swollen and infected, and finally the physicians in charge amputated the same. The evidence on the part of appellant tends to show that appellee was suffering from what is known as sarcoma; that the leg was so badly infected that the bone at the time of the accident was practically nothing more than a shell and could be easily broken. One of the physicians testified that a fall might cause it. The evidence as to how the injury occurred to appellee's leg is sharply conflicting.

It is first contended by appellant for a reversal of said judgment, that the verdict of the jury is against the manifest weight of the evidence and that this court should reverse said cause without remanding. Without going into a discussion of the evidence, it is only necessary for us to say that we do not regard the verdict of the jury as so manifestly against the weight of the evidence as to require us to reverse without remanding.

It is next contended by appellant that the court erred in refusing to allow evidence offered by appellant to the effect that appellee had made previous uncommunicated threats against him. The evidence offered was to the effect that appellee had said to a Mr. Hites that if appellant ever showed him

a certain paper signed by one Dave Sapp, he would knock his head off. Threats of this character, even though uncommunicated are admissable in evidence where they tend to characterize the act of the person charged with having made them. Campbell v. People, 16 Ill. 18; Neatherly v. People, 227 Ill. 116; Schoolcraft v. People, 117 Ill. 271-277; Palmer v. People, 138 Ill. 356-364; Seibert v. People, 143 Ill. 571-585.

In Campbell v. People, supra, the court says: "Upon the trial, the defense offered to prove that on that day, and at other times shortly before his death, the deceased had made threats against the prisoner. This evidence the court ruled out, and an exception was taken. In this the Court unquestionably erred, although they may never have come to the knowledge of the defendant till after the homicide was committed. If the deceased had made threats against the defendant, it would be a reasonable inference that he sought him for the purpose of executing those threats and thus they would serve to characterize his conduct towards the prisoner at the time of their meeting, and of the affray."

The testimony on the part of appellant in this case tended to show that appellee applied toward appellant a vile epithet, at the same time raising his right hand in a threatening manner with a corn knife in it. This evidence if admitted would have tended to show why appellee got off of the wagon. He having testified in effect that he did not know why he got off. We hold, therefore, that the evidence should have been admitted and that the court erred in refusing the same.

It is next contended by appellant that the court erred in admitting testimony with reference to the amount paid and incurred by appellee following the injury to his limb. Certain of the amounts claimed were not paid and as to those items the court erred in admitting the testimony as the declaration only claims for amounts actually paid or expended. Hinton v. Muhlman, 201 App. 177. As to certain other of the items claimed for, appellee failed to show by the testimony that the charges made were the usual, reasonable and customary charges for the services rendered. This testimony was objected to on that ground by counsel for appellant. The court therefore, erred in admitting the same. Moore v. Aurora, E. & C. R. R. Co., 150 App. 488-489; Schmitt v. Kurrus, 234 Ill., 581-582.

In Schmitt v. Kurrus, supra, the court at page 582 says: "In order to recover for medical and surgical services and treatment it was necessary for the plaintiff to prove two things: first, that he had paid or become liable to pay a specified amount; and, second, that the charges made were the usual and reasonable charges for services of that nature. He could recover no more than the amount which he had paid or become liable to pay, even if it was less than the usual and reasonable charge, for such services; and, on the other hand, he could not recover more than such usual and reasonable charge even if he had paid more. (North Chicago Street Railway Co. v. Cotton, 140 Ill. 486.)

It is next contended by appellant that the court erred in giving the fourth, sixth and seventh instructions given on behalf of appellee. The fourth instruction is as follows: "The court instructs the jury that the plaintiff by his replication

filed in this case denies that he assaulted the defendant as in the said second and third pleas set forth by the defendant; now if the jury after considering all of the evidence, facts and circumstances proven in this case find that the defendant has failed to prove by a preponderance of the evidence in this case (1) that the plaintiff first assaulted him. (2) that the defendant acted in necessary self-defense, and (3) that in so defending himself he used no more force than was necessary, or apparently necessary, the issue arising from the said second and third pleas and the said replication would be established." This instruction is erroneous as a party assaulted has the right to act upon appearances and if in so doing he acts as a reasonabby prudent person would act under the same similar circumstances, it is all the law dequires.

In People v. Scott, 284 Ill. 479, the court at page 480 says: "A man, when threatened with danger, must determine from appearances and the actual state of things surrounding him as to the necessity of resorting to self-defense, and if he acts from reasonable and honest convictions he will not be held responsible criminally for a mistake as to the extent of the actual danger, where other judicious men would have been alike mistaken. Campbell v. People, 16 Ill. 17; Enright v. People, 155 Ill. 32; People v. McGinnis, 234 Ill. 68; People v. Jones, 241 Ill. 482;; People v. Simpson, 270 Ill. 540; People v. Sinnot, 274 Ill. 184."

The seventh instruction given on behalf of appellee is with reference to the credibility and weight to be given to the testimony of the different witnesses and ends in the following language: "If after so considering you find that any witness has sworn falsely upon any material matter, in the case you have the right to wholly disregard his testimony, excepting in so far as it is corroborated by other credible evidence in the case or facts and circumstances shown by evidence offered." This instruction is erroneous in omitting the words "wilfully and knowingly" testified falsely on any material matter. Hoge v. The People, 117 Ill. 35-45; Perkins v. Knisely, 204 Ill. 275-277; Godair v. Ham. Nat. Bank, 225 Ill. 572-577.

The sixth instruction given on behalf of appellee is erroneous, first, in assuming that appellant caused appelle a permanent injury, as that on the evidence in the record was a question for the jury; second, in instructing the jury to fix the damages appellee would suffer for the rest of his life by reason of the loss of his leg; third, in directing the jury to fix appellee's damages for loss of time, etc., without any proof in the record to base it on, and fourth, in allowing the jury to fix damages for moneys expended for medical and surgical care and attention without proof that the amounts paid therefor were the usual, reasonable and customary charges for such services.

Other errors were assigned but as this cause will have to re-tried for the errors above mentioned, it will not be necessary for us to discuss the remainder of the errors assigned.

For the reasons above set forth the judgment of the trial court will be reversed and the cause will be remanded.

Reversed and remanded.

Not to be reported in full.

Term No. 27 Agenda No. 26

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

OCTOBER TERM, A. D. 1921.

WILLIAM H. BARNES,
Appellee,

vs.

NEW YORK LIFE INSURANCE COMPANY,
Appellant.

Appeal from City Court of East St. Louis

Opinion by Boggs, J.

Appellee, William H. Barnes, brought an action in assumpsit against appellant, the New York Life Insurance Company, in the City Court of East St. Louis for $486.00, alleged to be due him as agent for said company under an organization of insurance agents called "Nylic," a term made up of the first letters of the words "New York Life Insurance Company," and for a further sum of $166.98 as commission on a policy of $5,000 on the life of one Earnest Rickett of Chicago, Illinois.

Appellant filed a plea of the general issue and three special pleas; the substance of the defense set forth in said special pleas is as follows:

That under the written contract between the parties, dated October 3, 1910, effective January 1, 1911, it was provided as follows:

> "Second. It is agreed that the second party as such agent shall devote his best talents and energies to the business of this appointment, shall promptly deliver to the first party all applications for insurance upon Annual Dividend plan taken or obtained by him whether the medical examiner has reported thereon favorably or unfavorably, and shall strictly observe each and all the rules, regulations and requirements contained in the first party's book of 'Instructions to Agents' issued from time to time and such special instructions as may from time to time be given to him by any officer of the first party."
>
> "Eighteenth. It is agreed that either party hereto may, without cause, terminate this agreement upon thirty days' written notice."

That during all the time appellee was a member of Nylic the following rules and regulations were in full force and effect and binding upon him, being Rules 10 and 11 of the Book of "Instructions to Agents."

> "Ten. Rebates and Discriminations Prohibited. No agent of the New York Life Insurance Company shall pay or allow, or offer to pay or allow, or agree to

pay or allow, at any time, either directly or indirectly, any rebate of premium, or any special favor or advantage or valuable consideration whatever, on any policy of insurance, either to the applicant for such policy, or to any other person. Any agent violating the provisions of this rule shall immediately be dismissed from the Company's service, and shall forfeit all rights and interest that have accrued or may accrue under any contract which he may hold with the Company. Under the laws of New York the agent who allows and the insured who receives a rebate are guilty of a misdemeanor."

"Eleven. Report with Application. Form 106, properly filled out, must accompany each and every application and must clearly show the name of every person sharing in the commission and the share each person is to get."

That during all the time that appellee was a member of Nylic and an agent of appellant company there were in full force and effect certain rules of Nylic which appellee was bound to observe, of which he at all times had knowledge and upon the observance of which his membership in Nylic depended. Among these rules were the following:

"XI. Any Nylic who shall in any calendar year pay for less than $50,000 of new insurance in accordance with these rules, shall thereby cease to be a member of Nylic, and all claim to time credit or to any further payments from the Company on account of Nylic shall thereupon and thereafter be void and of no effect. The Company may cancel and terminate any agent's membership in Nylic and all benefits thereunder for violation of any Nylic rule or of any rule or regulation of the Company."

"XII. The termination of an agent's contract and agency, prior to his becoming a Senior Nylic, or the removal or transfer of an agent, prior to becoming a Senior Nylic, to any country where the Nylic benefits have not been extended by the Company to its agents, terminates his Nylic membership and all his Nylic rights."

That appellee, in violation of his agreement and in violation of the rules and instructions to agents did the following:

(a) On August 22 falsely reported to the Company that he had personally secured the application of Ernest Rickett. Said application was secured by Irving B. Brower, of Chicago, who was not an agent of the Company.

(b) Falsely reported in writing that he, Barnes, had no understanding or agreement with any other person, directly or indirectly, as to the commissions or compensation concerning the policy applied for by Rickett.

(c) Offered to pay or allow, either directly or indirectly, to Irving B. Brower, not an agent of the Company, a special favor or advantage or valuable consideration on account of the issuance of the Rickett policy and of the premium thereon.

Whereupon appellant, learning of the account of appellee and of his violation of the rules and instructions cancelled the policy issued to Rickett and returned the premium therefor; and cancelled and terminated Barnes' contract of employment,

which automatically cancelled the Nylic membership and caused a forfeiture of any commissions or compensation otherwise due under any contract with the Company, including any benefits or rights under Nylic.

In his replication appellee denied that he violated any agreement with appellant Company, denied that he violated any rules of Nylic or instructions of appellant company, denied that he made a false report on August 22, 1918, concerning the application of Rickett, denied that he agreed to divide or pay to Brower the whole or any part of the commission on the Rickett policy, and denied any false representations.

A trial was had, resulting in a verdict and judgment in favor of appellee for $728.71. To reverse said judgment this appeal is prosecuted.

While numerous errors are assigned on the record, the only assignment that we deem necessary to consider is the error assigned on the ruling of the court in refusing to direct a verdict for appellant at the close of all the evidence.

The evidence in the record, in our judgment, fully sustains the allegations of the special pleas filed by appellant.

The record discloses that appellee, a resident of East St. Louis, first entered the employment of appellant company on February 10, 1908, that thereafter on October 3, 1910, a new contract of agency was entered into, to become effective January 1, 1911, which said contract remained in effect until terminated by appellant company on November 14, 1918. Appellee became a member of Nylic January 1, 1911 and continued as such until his contract was terminated. He was what was termed a Nylick of the second degree. Nylick was a name given to an association of agents of the New York Life Insurance Company, under the rules of which, if they were in good standing and wrote paid insurance in excess of $50,000. they were entitled to certain benefits. These Nylick benefits were in addition to commissions under their agency contract. In the case of appellee, being a Nylick of the second degree, for his eleventh year of continuous membership he would have been entitled to 75 cents per $1,000. of insurance written in the sixth Nylick year multiplied by twelve. Appellee was claiming $486. by virtue of his Nylick membership on the paid insurance claimed to have been written by him, and $166.98 for commissions on the Rickett policy.

It is the contention of appellant that the Ricketts application was obtained by appellee through Irving B. Brower and that he was to be paid the whole or a part of the commission thereon, and that, this being true, automatically terminated his Nylic membership and all rights accrued thereunder.

On the other hand, appellee contends that the policy was taken by him and that he has done nothing to warrant appellant company in forfeiting his contract of agency, and that, even though the company had the right to terminate the contract of agency on thirty days' notice, that he, appellee, would not be barred from recovering for Nylic benefits and commissions earned prior to the termination of the contract.

The witness Brower identified several letters that he had received from appellee in connection with the work Brower had undertaken to do for Barnes in getting applications for insurance in appellant company. Brower lived in Chicago, and the record discloses that appellee Barnes was attempting, through

Brower, to work up a business in Chicago. In a postscript to a letter from appellee to Brower, dated August 28, 1918, appellee says: "Yes, I think check better be made in full to New York Life and sent to me and then I can remit to you." In a postscript in a letter written from appellee to Brower, dated September 4, 1918, we find the following: "Your last was opened by mistake, so be careful and let me read between the lines. I fear some one here was suspicious, but could detect nothing from your letter. The company will not stand for division of com. A hint to the wise. Hope you may get some big prospects and if you need me there, command me. I will come. B." In a letter from appellee to Brower, dated September 14, 1918, we quote: "Policy came this a. m., rated up six years for $10,000. I fear you are not familiar with rate-up policies and it seems to me it would be safer for me to see insured in person with you. In case this policy is placed will allow you even $200. If thought best could remain through the week and call on prospects you may have in mind and divide coms by two." And then in a postscript to a letter dated September 18, 1918, appellee says: "I write in my own hand to keep the office force in the dark, etc." A letter dated October 28, 1918 from appellee to Brower contains this statement: "Send check to me for less Annual Prem. on Rosenfield's policy and then expect check for yourself at once." And in a letter dated November 6, 1918, he says: "Your letter came in due time and I am mailing you the $1000. Rosenfield policy changed to 1-4 premium. Please send me the check for the premium of $13.41 and I will mail you a check for $3.29 which is 70 per cent. of this 1-4 commission annual which you say is correct in your last letter. Regarding the Rickett matter will say that we agreed on my receiving $75.00 of the commission on the 10,000 rate-up policy provided you asked me to come to Chicago to aid you in placing it, and this you did. We called on Mr. Rickett and he asked us to give him the night to consider the matter, which was done. Before we met Mr. Rickett the second time the 5000 level rate policy came and you felt sure we could place both policies and then we agreed to go fifty-fifty on the 5000 policy."

Brower testified that he had a definite understanding with Barnes with reference to commissions. We quote certain questions and answers in Brower's examination:

"Q. Did you have any definite understanding with him (Barnes) as to how commissions were to be handled?

A. Yes sir, some way we did.

Q. What was that arrangement?

A. It was that if I got them I was to have 75 per cent.

Q. And he was to have 25 per cent?

A. He was to have 25 per cent.

Q. Of the commission?

A. Yes. If he had to come up there (Chicago) would be a different division, and he would make it on each individual case.

We also quote from the cross-examination of appellee:

Q. Now, Mr. Barnes, you say you never had any agreement with anyone about dividing the commission?

A. I have stated two or three times—

Q. Now, wait; will you please answer the question?

A. Yes, I did.

Q. That you had no such agreement?

A. I say I did have an agreement. That is not definite.

Q. I didn't ask you that—you had an agreement with Mr. Brower, didn't you?

A. Not as to any amount.

Q. I didn't ask you as to any amount. I am going to ask you about that when you answer this question. You had an agreement with Mr. Brower to give him something out of the commission?

A. Yes sir.

Q. And you had an agreement at that time as to the amount you were to give him? That is what you are saying?

A. Yes sir.

From the foregoing testimony and from the extracts made from the letters of appellee, the proof is positive that appellee had a definite arrangement with Brower to pay him a part or all of the commissions on applications obtained by Brower.

Appellant, upon ascertaining that appellee had divided commissions with Brower on the Rickett policy, cancelled the same and returned the premium to Rickett. It seems that, under the provisions of the constitution of the New York Life Insurance Company, they have no right to accept policies that are procured by unlicensed agents. Appellee had his attention definitely directed to the provision of appellant company with reference to the matter of rebating premiums and giving special favors or advantage to anyone in order to procure a policy. On February 10, 1918, appellee wrote appellant, copying Section 10 of appellant's instructions to agents, set forth in the pleas, and closed by saying: "I agree to abide by the foregoing rule, and I fully understand the penalty that attaches to a violation of it."

In Lehman v. Clark, 174 Ill., 279, the Court at Page 287 says:

"The application, certificate of membership and by-laws all provide that upon failure to pay any assessment for a death benefit within the time specified, the certificate of membership should become void and the member forfeit all benefits in the association and all moneys paid. The provisions of the contract make the forfeiture a part of the contract, and a failure to pay within the time limited causes the forfeiture, and the contract is self-executing in creating the forfeiture. (Northwestern Traveling Men's Assn. v. Schauss, 148 Ill., 304.)"

In Lang v. Hedenberg, 277 Ill., 368, the Court at Page 377 says:

"Counsel for plaintiff in error further argue that the result of the decrees is that a court of equity is lending its aid to enforce the forfeiture of the $1000 earnest money. Undoubtedly, under the authorities, equity will not declare or enforce a forfeiture where it is harsh or inequitable to do so, (Tarr v. Stearman, 264 Ill., 110, and cited cases), but all the authorities recognize that competent parties may make a contract as to penalties and forfeitures, and that courts of equity, as well as courts of law, will recognize the rights of the parties as to such penalties or forfeitures."

Appellee, in the letter of February 10, 1918, after quoting the provisions of Section 10 of "Instructions to Agents," states, "I agree to abide by the foregoing rule and I fully understand the penalty that attaches to a violation of it." In other words, appellee, in becoming an agent of appellant company, contract-

ed to be bound by the provisions of its "Instructions to Agents," above cited, and under the authorities above cited, the violation of his contract terminated and forfeited his rights thereunder.

It is also a well established principle of law that compensation is paid to an agent for the performance of his duties as such agent in compliance with his contract of agency, and substantial failure to so comply therewith deprives him of the right to recover compensation thereunder. Sidway v. American Mortgage Company, 222 Ill., 270; Prestcott v. White, 18 Ill. App., 324.

In Sidway v. American Mortgage Company, supra, the Court at Page 275 says:

"The law is that the agent is entitled to his commission only upon a due and faithful performance of all the duties of his agency in regard to his principal. (Hafner v. Herron, 165 Ill., 242; Prescott v. White, 18 Ill. App., 322.) 'If the agent does not perform his appropriate duties, or if he is guilty of gross negligence of gross misconduct or gross unskillfulness in the business of his agency, he will not only become liable to his principal for any damages which he may sustain thereby, but he will also forfeit all his commission.' (Story on Agency, sec. 331; 1 Am. & Eng. Ency. of Law,—2d ed.—1101) * * * In the application of this rule it makes no difference whether the result of the agent's conduct is injurious to the principal or not; in such case the misconduct of the agents affects the contract from considerations of public policy rather than of injury to the principal. (Hafner v. Herron, supra; Young v. Hughes, 32 N. J. Eq., 372.)"

We hold ,therefore, that appellee not only forfeited his right to commissions on the Rickett application, but also forfeited his right to Nylick benefits by reason of his dividing commissions with Brower in violation of the provisions, rules, regulations and instructions to agents of appellant company.

The Court erred in failing to direct a verdict in favor of appellant at the close of all the evidence, and the judgment is reversed, therefore.

Judgment Reversed.

FINDING OF FACTS.

We find, as an ultimate fact in this case, that appellee, after entering the employment of appellant as its agent, violated the terms of his agency by sending in applications for insurance in appellant company procured by the witness Brower, and in making arrangements with Brower to pay him the whole or a part of the commission therefor, and also at the same time representing to appellant company that he, Barnes, had secured same and was not paying any one else anything in connection therewith.

Not to be reported in full.

2347a

Term No. 39 Agenda No. 41

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

OCTOBER TERM, A. D., 1921.

K. OVIAN,

Appellee.

vs.

VAHN KEZIRIAN,

Appellant.

Appeal from
St. Clair County
Circuit Court.

Opinion by Boggs, J.

Suit was brought by appellee against appellant before a Justice of the Peace of St. Clair County, and appealed therefrom to the Circuit Court of said County where a trial was had resulting in a verdict and judgment against appellant for the sum of $100. and costs. To reverse said judgment this appeal is prosecuted.

The record discloses that appellee and appellant had been engaged as partners in the grocery business in East St. Louis and that prior to the institution of this suit in the Justice Court appellant sold his interest in said business to appellee for the sum of $1937.00 which sum was paid at the time of the closing of said transaction. Thereafter appellee brought this suit against appellant claiming that it was agreed by appellant that if one Magarian who was indebted to said firm in the sum of $100. should fail to pay appellee said indebtedness, he, appellant would reimburse appellee therefor and that said indebtedness had not been paid.

Appellant insists that no such agreement was made; that the sale by appellant to appellee of his interest in said business was unconditional. He further contends that even though it should be held that said sale had been made with the understanding that the account of Magarian for $100. should be paid, he, appellant, would only be liable for one half thereof.

An examination of the evidence in this case satisfies us that the sale in question was unconditional and that whatever agreement, if any, was entered into by said parties in reference to the Magarian account, it was made after said sale was entered into and was without consideration.

We therefore hold that the court erred in not directing a verdict for appellant. In any event, no recovery could have been had for more than $50. but we hold no right of recovery exists for any amount.

For the reasons set forth the judgment of the trial court is reversed without remanding, with finding of fact.

Reversed without remanding.

We find as an ultimate fact that the sale in question was unconditional and that no right of recovery exists.

Not to be reported in full.

Term No. 44 Agenda No. 8

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

OCTOBER TERM, A. D. 1921.

FRANCES E. FRITZ, Appellee. vs. WILLIAM J. LEMP, Jr., and EDWIN A. LEMP, Appellants.	Appeal from City Court of DuQuoin, Perry County.

Opinion by Boggs, J.

Appellee filed a bill in the City Court of Du Quoin, running to the July Term, 1919, making appellants parties defendant and seeking to declare and enforce a lien on property owned by appellants in said city for the purpose of satisfying a judgment obtained by appellee against certain dram shop keepers.

Said bill was amended and as amended charged, in effect, that at the January Term, 1919, of said court appellee obtained a judgment against John C. Calvetti, Walter Young, Henry Valentin, Dominec Mesino and Joe Johnson in the sum of $6,000 for damages alleged to have been sustained by her on account of sales of liquor made to J. G. Fritz, her husband, which said liquors caused him to become an habitual drunkard, to squander and waste his property and money and to neglect the support of appellee. Said bill further charges that from the 6th day of June, 1912 to the 6th day of June, 1917, appellants knowingly permitted intoxicating liquor to be sold upon said premises and that said above named dram shop keepers, as tenants of appellants, did sell to the said J. G. Fritz, husband of appellee, causing his habitual intoxication and his neglect to support appellee, his wife, and that as a further result of said intoxication the said J. G. Fritz died on June 6, 1917.

Said bill also charges that appellants were threatening to convey said premises in order to defeat said judgment and prays that appellants be enjoined from conveying said premises and that, in default of said above mentioned judgment, that said premises be sold in order to satisfy the same.

To said amended bill appellants filed an answer denying all the material allegations of said bill, including a denial of the ownership and control of the premises described in said amended bill. Said answer further charged that after the beginning of said suit by appellee against said dram shop keepers, and after having obtained service against the defendants in said case, that John Richards and Charles Brooks, two of the defendants in said cause, paid to appellee the sum of $500

in satisfaction of her cause of action against said Richards and Brooks under the Dram Shop Act, and that payment of said money constituted full satisfaction against all of said defendants. Said cause was heard by the presiding Judge in open court and thereafter on the 19th day of March, 1921, being one of the regular judicial days of the January Term, 1921, of said court, a decree was rendered in said cause, finding the issues for appellee and decreeing a lien on said premises for the satisfaction of said judgment of $6,000 and the cost of said proceeding, after deducting from said judgment the said sum of $500 paid to appellee by John Richards and Charles Brooks. The Court finds in said decree that the $500 paid by the said John Richards and Charles Brooks was on a covenant "not to further sue John Richards and Charles Brooks in the original suit filed herein." A motion has been made by appellee to strike the purported certificate of evidence from the transcript of the record filed by appellants herein. The ground of said motion is that the decree from which appellants are seeking to prosecute an appeal was rendered on the 19th day of March, 1921, and that at said time appellants were granted sixty days in which to present a certificate of evidence and that on the 10th day of May, 1921, at a subsequent term of said court, the court extended the time for the presentation of said certificate thirty days, and that the appellant failed to comply with said order of the court and failed to present a certificate of evidence within the time granted.

Without going into the matter of when the certificate of evidence was filed, we find upon an examination of the record in this case that it fails to show that appellants prayed an appeal from the judgment or decree at the term in which it was rendered, as provided by statute. Sec. 92, Chap. 110, Hurd's Revised Statutes.

The right to an appeal is purely statutory and in order to perfect an appeal the provisions of the statute in reference thereto must be followed. In Bondurant vs. Bondurant, 251 Ill., 324, the Court at Page 327 says: "The Practice act requires that an appeal shall be prayed and allowed at the term at which the judgment, order or decree appealed from is entered, and not more than twenty days from the entry of such judgment, order or decree. The party appealing is neither required nor permitted to wait until the adjournment of the term to pray an appeal or have it allowed."

There being no prayer nor order for an appeal shown by the record, it is the duty of the court on its own motion to dismiss the appeal, and it is so ordered.

Appeal dismissed.

Not to be reported in full.

Filed March 24th 1922

Term No. 44 Agenda No. 8

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

OCTOBER TERM, A. D. 1921.

FRANCES E. FRITZ, Appellee. vs. WILLIAM J. LEMP, Jr., and EDWIN A. LEMP, Appellants.	Appeal from City Court of DuQuoin, Perry County.

Opinion by Boggs, J.

Appellee filed a bill in the City Court of Du Quoin, running to the July Term, 1919, making appellants parties defendant and seeking to declare and enforce a lien on property owned by appellants in said city for the purpose of satisfying a judgment obtained by appellee against certain dram shop keepers.

Said bill was amended and as amended charged, in effect, that at the January Term, 1919, of said court appellee obtained a judgment against John C. Calvetti, Walter Young, Henry Valentin, Dominec Mesino and Joe Johnson in the sum of $6,000 for damages alleged to have been sustained by her on account of sales of liquor made to J. G. Fritz, her husband, which said liquors caused him to become an habitual drunkard, to squander and waste his property and money and to neglect the support of appellee. Said bill further charges that from the 6th day of June, 1912 to the 6th day of June, 1917, appellants knowingly permitted intoxicating liquor to be sold upon said premises and that said above named dram shop keepers, as tenants of appellants, did sell to the said J. G. Fritz, husband of appellee, causing his habitual intoxication and his neglect to support appellee, his wife, and that as a further result of said intoxication the said J. G. Fritz died on June 6, 1917.

Said bill also charges that appellants were threatening to convey said premises in order to defeat said judgment and prays that appellants be enjoined from conveying said premises and that, in default of said above mentioned judgment, that said premises be sold in order to satisfy the same.

To said amended bill appellants filed an answer denying all the material allegations of said bill, including a denial of the ownership and control of the premises described in said amended bill. Said answer further charged that after the beginning of said suit by appellee against said dram shop keepers, and after having obtained service against the defendants in said case, that John Richards and Charles Brooks, two of the defendants in said cause, paid to appellee the sum of $500

in satisfaction of her cause of action against said Richards and Brooks under the Dram Shop Act, and that payment of said money constituted full satisfaction against all of said defendants. Said cause was heard by the presiding Judge in open court and thereafter on the 19th day of March, 1921, being one of the regular judicial days of the January Term, 1921, of said court, a decree was rendered in said cause, finding the issues for appellee and decreeing a lien on said premises for the satisfaction of said judgment of $6,000 and the cost of said proceeding, after deducting from said judgment the said sum of $500 paid to appellee by John Richards and Charles Brooks. The Court finds in said decree that the $500 paid by the said John Richards and Charles Brooks was on a covenant "not to further sue John Richards and Charles Brooks in the original suit filed herein." A motion has been made by appellee to strike the purported certificate of evidence from the transcript of the record filed by appellants herein. The ground of said motion is that the decree from which appellants are seeking to prosecute an appeal was rendered on the 19th day of March, 1921, and that at said time appellants were granted sixty days in which to present a certificate of evidence and that on the 10th day of May, 1921, at a subsequent term of said court, the court extended the time for the presentation of said certificate thirty days, and that the appellant failed to comply with said order of the court and failed to present a certificate of evidence within the time granted.

Without going into the matter of when the certificate of evidence was filed, we find upon an examination of the record in this case that it fails to show that appellants prayed an appeal from the judgment or decree at the term in which it was rendered, as provided by statute. Sec. 92, Chap. 110, Hurd's Revised Statutes.

The right to an appeal is purely statutory and in order to perfect an appeal the provisions of the statute in reference thereto must be followed. In Bondurant vs. Bondurant, 251 Ill., 324, the Court at Page 327 says: "The Practice act requires that an appeal shall be prayed and allowed at the term at which the judgment, order or decree appealed from is entered, and not more than twenty days from the entry of such judgment, order or decree. The party appealing is neither required nor permitted to wait until the adjournment of the term to pray an appeal or have it allowed."

There being no prayer nor order for an appeal shown by the record, it is the duty of the court on its own motion to dismiss the appeal, and it is so ordered.

Appeal dismissed.

Not to be reported in full.

Term No. 61 Agenda No. 47

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

OCTOBER TERM, A. D. 1921.

ELLEN WILLIAMS,
Appellee.

vs.

THE ILLINOIS CENTRAL RAIL-COMPANY,
Appellant.

Appeal from the Circuit Court of Marion County.

Opinion by Boggs, J.

An action on the case was brought in the Circuit Court of Marion County by appellee against appellant railroad company to recover damages for injuries sustained by appellee, alleged to have been caused through the negligence of appellant, while appellee was alighting from one of appellant's passenger trains in Champaign, Illinois on the 17th day of June, 1920.

The declaration consists of three counts. The first count charges, in substance, that appellee was a passenger on appellant's train from Kinmundy to Champaign, and that, though its servants knowing it was about eighteen inches from the lower step of its passenger coach to the platform, and that appellee was a fleshy person, weighing about two hundred pounds, negligently and carelessly failed to furnish any stool or box for appellee to step from said car to said platform, and that while appellee was alighting from said train, using due care and caution for her own safety, appellant negligently permitted a number of persons to board the adjoining car and to pass therefrom to the platform of the car from which appellee was alighting, and that while in the act of stepping to the platform, she was boisterously pushed and shoved by said passengers, causing her to fall to the platform, resulting in the injury in question, etc.

The second count is in effect the same as the first except the negligence charged being that the appellant, carelessly and negligently, permitted divers persons to climb upon the step of said car and to pass in a violent and boisterous manner to the platform of the car from which appellee was alighting, whereby appellee was pushed and thrown from the step of said car and injured. The third count is practically the same as the second.

To said declaration appellant filed a plea of the general issue. A trial was had, resulting in a verdict in favor of appellee for $5,000. Appellant made a motion for a new trial which was overruled, and judgment was rendered on said verdict against appellant for the amount of said verdict and costs. To reverse said judgment this appeal is prosecuted.

At the close of appellee's evidence and again at the close

of all the evidence, appellant entered a motion to exclude the evidence and to direct a verdict in its favor, which said motions were denied. Appellant insists that the ruling of the Court thereon was reversible error.

Without going into an extended discussion of the evidence on this motion, we will say that the evidence offered on behalf of appellee fairly tended to prove the allegations of her declaration. The Court therefore did not err in refusing to direct a verdict. Kelly v. Chicago C. R. Co., 283 Ill. 640; Dizine v. Delano, 272 Ill. 166.

It is next contended by appellant that the verdict of the jury is against the manifest weight of the evidence. The undisputed evidence in the record is to the effect that appellee was a passenger on appellant's train on the day in question, from Kinmundy to Champaign; that while she was alighting from the train at Champaign she fell and was injured; that the small bone of her right leg at the outside of the ankle joint, the fibula, where it joins the tibia, was fractured, and that she also injured her right shoulder and back or spine; that the injury to her ankle is a permanent one and that to a certain extent she will be crippled for life.

The testimony of appellee is further to the effect that prior to the train arriving at Champaign, the porter announced that the train would stop fifteen minutes for luncheon; that the passengers were alighting from the car, and that appellee was one among the last to get off the car. As she was preparing to alight from the step of the car to the platform, she looked and there was no stool or box for her to step on; that the porter was calling out to the passengers who were going to board the train, to "show their tickets"; and that other persons, presumably students, were getting on the steps of the car immediately north, being the smoker, and were passing up those steps and across from that car into the ladies coach in which appellee had been riding; that the students were making considerable noise and were getting on in a boisterous manner and that they or someone else pushed her, whereby she fell from the step of the car to the platform and sustained the injuries in question. Appellee was corroborated by her daughter who had come to meet her as to all the matters and things that she testified to which took place after she reached the steps of the car and as she was attempting to alight.

On the other hand, the porter, being the only witness on the part of appellant who saw appellee leave the car, testified that on arriving in Champaign he opened the vestibule door to the north end of the ladies' coach and placed the stool or box to be used in alighting from the car on the platform at the lower step of the ladies' coach; that the vestibule door to the car next north, being the smoker, was closed, and that it was impossible for anyone to get on that car at that time. He further testified that it was his duty not to allow persons to board the train until the passengers desiring to alight therefrom had had an opportunity to do so. He further testified that appellee, in alighting from the car, missed the stool or box and that he attempted to keep her from falling, but on account of her weight was unable to do so. Upon the train's arrival at Champaign, the conductor went to the dispatcher's office and from there to the lunch counter, so he was not present or assisting persons to alight from or to board the train, and did not see the accident. The flagman was assisting passengers on and off the train at the next car back. It might further be observed

that the porter testified that his recollection with reference to the opening of the door, the placing of the box, etc. was from his general recollection as to how those things were performed in the regular course of business. The evidence in the record supports the verdict of the jury, and it is not against the manifest weight of the evidence.

It is next contended by appellant that the Court erred in its rulings on the evidence. Frances Williams, daughter of appellee, was permitted to testify that she had observed the height of the step on other trains that were there, and that the steps on this train were about the same as the steps on the other trains. We do not think any serious error resulted from this ruling, as the testimony offered by appellee and that of the porter with reference to the height of the step from the platform was practically the same. While we do not think that the ruling was proper, no serious injury resulted to appellant therefrom.

It is next contended that the Court erred in its rulings on the hypothetical question which was put to Dr. McKinney, he being the doctor who treated appellee immediately following her injury. We have examined this question and are of the opinion that there was no serious error on the part of the Court on the ruling on this question, especially in view of the fact it is not contended by counsel for appellant in their argument for a reversal of the judgment in this case that the verdict of the jury is excessive. This being true, the ruling on the hypothetical question is not important.

It is next contended by appellant that the Court erred in refusing to allow testimony to be offered on behalf of appellant to the effect that the rules of appellant company then in force prohibited passengers from boarding trains without showing their tickets. We think that the ruling of the Court in refusing to allow this testimony was proper as that was not an issue in the case. We are of the opinion, and so hold, that there was no reversable error on the part of the Court in its rulings on the evidence.

It is next contended by appellant that the Court erred in its rulings on the instructions. It is contended by appellant that the Court erred in giving the first, second and third instructions given on behalf of appellee. These instructions are as follows:

1. "The Court instructs the jury that common carriers of persons are required to do all that human care, vigilance and foresight can reasonably do, consistent with the character and mode of conveyance adopted and the practical prosecution of the business to prevent accidents to passengers riding upon their train or alighting therefrom."

2. "The Court instructs the jury that the relation between passengers and a railroad company does not cease upon the arrival of a train at the place of the passenger's destination, but that the company is still bound to furnish the passenger an opportunity to safely alight from the train, and it is also the duty of such railroad company, not only to exercise a high degree of care while the passenger is upon the train, but also to use the highest degree of care and skill, reasonably practical, in providing the passenger a safe passage from the train."

3. "The Court instructs the jury that a common carrier is required by law, in the management and operation of its trains, and in the management and maintenance of the steps leading from its passenger coach and the platform used in con-

nection therewith, at the point where passengers get upon and off of its passenger cars, to exercise the highest degree of care, skill and diligence for the safety of their passengers consistent with the mode of conveyance adopted and its practical operation."

While these instructions are all abstract in form, they state correct principles of law and in our judgment were applicable to the facts in the case. (Penn. v. McCaffrey, 173 Ill. 169; C. & E. I. R. R. Co. v. Jennings, 190 Ill. 478-483; Merrill v. Mich. Central R. R. Co., 158 App. 38-40; Walsh v. Chic. Ry. Co., 294 Ill. 586.

It is the contention of appellant, as we understand, that even though it did allow persons to board the train in question before the passengers thereon had had an opportunity to alight, and even though it did not have the box or step in place at the time appellee was alighting therefrom, if appellee was caused to fall by reason of someone pushing or jostling her, the company would not be liable. Certainly, if appellant is correct in this contention, the giving of these instructions was not proper. An examination of the cases above cited, however, will disclose that the contention of appellant is not tenable. In Penn Co. v. McCaffrey, supra, the Court, in discussing this question, at page 173 says: "When appellee alighted, the relation between himself and appellant was that of passenger and carrier. This relation between a passenger and a railroad company does not cease upon the arrival of a train at the place of the passenger's destination, but the company is still bound to furnish him an opportunity to safely alight from the train. It is its duty, not only to exercise a high degree of care while the passenger is upon the train, but also to use the highest degree of care and skill, reasonably practicable, in providing the passenger a safe passage from the train. (Denver, etc. Railroad Co. v. Hodgson, 18 Col. 117; Chicago and Eastern Illinois Railroad Co. v. Chancellor, 60 Ill. App. 525)."

In Walsh v. Chic. Ry. Co., supra, the Court at page 591 says: "A street railway company in operating its cars through its servants is required to do all that human care, vigilance and foresight can reasonably do, in view of the character and mode of conveyance adopted and consistent with the practical operation of the road, to carry safely a passenger. (Tri-City Railway Co. v. Gould, 217 Ill. 317; North Chicago Railroad Co. v. Polkey, 203 id. 225; Chicago City Railway Co. v. Shreve, 226 id. 530; Sandy v. Lake Street Elevated Railroad Co. 235 id. 194.) And this same ruling necessarily applies to passengers while entering and alighting from cars."

The Court did not err in the giving of the three instructions given on behalf of appellee above set forth.

It is next contended by appellant that the Court erred in refusing to give appellant's first, second and third refused instructions. So far as appellant's refused instructions Nos. 1 and 3 state correct principles of law, they are covered by appellant's given instruction No. 7, and the Court therefore did not err in refusing to give the instructions. With reference to appellant's refused instruction No. 2, will say that we have examined the same and are of the opinion that on the record in this case there was no substantial error in the Court refusing to give the same.

Finding no reversible error in the record, the judgment of the trial court will be affirmed.

Judgment affirmed.

Not to be reported in full.

2349a

Term No. 21 Agenda No. 51

IN THE APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

OCTOBER TERM, A. D. 1921

W. H. CALVERLEY, Appellee

vs.

R. F. HEIN, Appellant

Appeal from Wabash County Court

Opinion by Barry, J.

This case was tried before a Justice of the Peace and twice before a jury in the County Court. The suit was brought by appellee to recover for the services of a jack. The terms were "$10.00 to insure a mare in foal, payable when the fact is ascertained, or mare parted with." Three of appellant's mares were served and they were sold by appellant before the period of gestation had expired.

Appellant sued for $30.00 and appellant claimed and the jury allowed him a setoff of $3.00 and returned a verdict for $27.00. The Court overruled a motion for new trial and entered judgment on the verdict.

Appellant contends that the Court erred in refusing to allow him to prove that when he sold the mares none of them were with foal, but as the fees were to be payable when apellant sold and parted with the mares there is no force in that contention.

Appellant further contends that the judgment should be reversed because the statute requires that the owner of a jack used for public service shall keep a copy of his license certificate posted on the stall door or enclosure leading to the stall or building where such jack is kept and that appellee failed to make proof of the fact that the copy of the license was posted.

The law is that where a lawyer, physician, dentist and the like, is required to take out a licnse in order to permit him to practice his profession, in a suit by him to recover fees or compensation for services rendered, it will be presumed that he has such license until the contrary is shown. Beckers vs. City of Kankakee, 213 App. 538-453; Woodley vs. Zemean, 178 App., 369; Good vs. Lasher, 99 App., 653.

The question whether plaintiff had a license to do business as a mason contractor is a collateral one in an action on a contract for mason work, and the issuance of such license will be presumed unless the contrary fact is specially relied on as a defense and proved in the trial court, Woodley vs.

Zeman, 178 App., 369. So in the case at bar, if appellant desired to make the defense relied upon here, he should have proved in the trial court that appellee did not comply with the terms of the statute in regard to posting a copy of the license.

But even if such proof had been made, we doubt if it would render the contract for services invalid. 17 R. C. L. 558; Benj. on Sales (Corbins Ed.) 825; Benj. on Sales (Bennetts 1892 Ed.) 538. In the case at bar the statute does not make the posting of the copy of the license a condition precedent.

None of the objections urgd by appellant are well taken and the judgment is affirmed.

Affirmed.

Not to be reported in full.

Term No. 50 Agenda No. 27

IN THE APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

OCTOBER TERM, A. D. 1921

JOHN E. CLOUD, Admr. &c.,
Appellee

vs.

MARIAH SWINNEY,
Appellant.

Appeal from
Gallatin County
Court.

Opinion by Barry, J.

Mary F. Cloud died intestate June 17, 1920, leaving a small estate consisting of real estate and personal property. Her brother, John E. Cloud, was duly appointed administrator on February 14, 1921, and qualified as such. He made a report to the Court showing the amount of the claims allowed against the estate, the value of the personal property and the amount of the deficiency, and filed a petition in the County Court for an order to sell real estate to pay debts. To that petition appellant and all of the heirs of the deceased were made parties defendant. The petition shows that $634.50 of the indebtedness against the estate was really the debt of John E. Cloud for which the deceased was surety, and that he proposed to pay such debt out of his share of the proceeds of the sale, which is one-fifth thereof.

Appellant filed three pleas to the petition. The first was to the effect that the administrator had previously filed a similar petition to the May term of said County Court for an order of sale and that appellant answered the same and on a hearing the Court dismissed the petition, finding that the Circuit Court had acquired prior jurisdiction of the subject matter and that said order of dismissal remains in full force and effect. Issue was joined on that plea.

The second plea set up that appellant had filed a bill for partition to the April Term, 1921, of the Circuit Court, against all of the parties to the petition in which she had set out the rights and interests of the parties and that said bill is pending and undetermined. The third averred that a part of the claims probated against the estate were the personal debts of John E. Cloud, and that deceased was only liable thereon as surety. Demurrers were interposed and sustained to those pleas. The Court heard the evidence and entered an order for the sale of the land, from which this appeal has been perfected.

All of the parties agree on the fact that there should be a sale of the real estate, but the controversy is as to how it

shall be accomplished and who shall receive the fees therefor.

Appellant contends that the Court erred in sustaining the demurrers to her second and third pleas. The identical question raised by the second plea was decided adversely to her contention by the Appellate Court of the Third District, Rowden vs. Meisinger, 164 App., 125, and we agree with the conclusions of the Court in that case. In addition to the reasons given in that case the second plea is a plea in abatement and was not verified and was filed with a plea in bar, and the Court properly sustained the demurrer thereto. The third plea set up no defense to the action.

Issue was joined on the first plea and evidence heard. That plea is one of **res judicata.** It avers that appellant appeared and answered the former petition of the administrator, who filed his replication thereto and evidence being heard the Court entered a final decree dismissing the petition and finding that the Circuit Court had acquired prior jurisdiction of the subject matter which remained in full force and effect.

The evidence does not support the plea. It shows that appellant did not file an answer, but a plea of former action pending to which the administator demurred and the demurrer was overruled. The record shows that on May 2, 1921, the Court entered the order "Demurrer overruled." That was not a final judgment, but the administrator took the orders for an appeal to the Circuit Court. On the next day the Court entered the following order: "Leave given petitioner to take nonsuit. Costs taxed against John E. Cloud, petitioner, and this suit is dismissed without prejudice."

At a subsequent term of Court, on September 8, 1921, the Court redocketed the cause and entered an order, without notice to the administrator, so far as the record shows, to the effect that on May 2, 1921, the Court overruled the demurrer to the pleas and pronounced and rendered judgment in favor of appellant dismissing the petition at the costs of the administrator and that the Court had failed to enter said judgment of record. The Court then ordered the clerk to enter such judgment **nunc pro tunc** as of May 2, 1921.

When the Court overruled the demurrer the order to that effect was not a final order. The administrator had a right to reply or elect to stand by his demurrer. No rule was entered on him to reply and he did not elect to stand by his demurrer, so the Court could not under that situation enter an order dismissing his petition. The Court could not at a subsequent term of Court redocket the cause and without notice order such a judgment entered **nunc pro tunc.** Before the last mentioned order was entered the Court, on May 2, 1921, had given leave to the administrator to take a non-suit and the petition had been dismissed without prejudice.

It is argued that the Court erred in allowing the guardian ad litem a fee because he represented the administrator in the suit in Circuit Court and argued strenuously for the sale of the land in the County Court. We find no such evidence in the record and there is no claim that the fee allowed was too large. There is no merit in the objections urged to the allowance. It is argued that the administrator is seeking to sell the land in order to pay his own debts. While he owed a part of the indebtedness, yet the deceased was surety and the es-

tate was liable therefor. If some other person had been administrator the same reasons for selling the land would exist and there could be no objections made because it was a surety debt. The administrator offered in his petition to pay his part of the debts out of the proceeds of the sale, and when the land is sold the Court should see that this is done.

There is no merit in the contention that the Court left it optional with the administrator as to how much of the land he should sell. The order is that he shall sell all of the real estate, describing it, or as much as may be necessary to take care of the debts. Finding no error in the record the judgment of the County Court is affirmed.

Affirmed.

Not to be reported in full.

Term No. 1. Agenda No. 11.

IN THE APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

OCTOBER TERM, A. D. 1921

JOSIE FEHNER, Appellee. vs. ST. LOUIS ELECTRIC TERMINAL RAILWAY COMPANY and EAST ST. LOUIS RAILWAY COMPANY, Appellant. EAST ST. LOUIS RAILWAY COMPANY. Appellant.	Appeal from the City Court of Granite City.

Opinion by Boggs, J.

An action on the case was brought by Josie Fehner in the City Court of Granite City against appellant, the St. Louis Electric Terminal Railway Company and plaintiff in error, the East St. Louis Railway Company, to recover for injuries which she sustained while riding in an automobile which was struck by an interurban car, operated by appellant over the tracks of plaintiff in error.

The first count charges that appellant was running an electric car over the tracks of plaintiff in error with its consent and that through the negligent operation of said car it left the track on which it was being driven and ran against said automobile, knocking appellee down, injuring her, etc.

The second count, as amended charges that the car of appellant was not adapted for use on rails of the character used by plaitiff in error on the track on which the car was being driven. That the rails of the latter company were chipped, broken, defective and unsafe, which conditions were known to both defendants, and that by reason thereof said car left said track causing appellee's injury as above set forth.

Both counts of said declaration allege due care on the part of appellee for her own safety.

To said declaration a plea of the general issue was filed by appellant and plaintiff in error. A trial was had resulting in a verdict in favor of appellee for the sum of $7750.00 and costs. To reverse said judgment, appellant appeals to this court and plaintiff in error prosecutes its writ of error.

The record discloses that on May 30, 1918, appellant company undertook to carry a party of Shriners from East St. Louis to Staunton, Illinois. Under an agreement with plaintiff in error it sent its car into East St. Louis, off its own lines and upon the tracks of plaintiff in error. While proceeding over the tracks of plaintiff in error, a pilot was furnished by it, who stood in front with the motorman and gave instructions and directions for running the car over its lines.

While thus proceeding with said car along Thirteenth

Street in the City of East St. Louis, said car suddenly left the tracks and travelled in a diagonal direction across the pavement and struck an automobile in which appellee was riding. The Interurban car was travelling North and the automobile was being driven South when the accident occurred. The automobile was on the right hand side of the street and there is no contention that the appellee was guilty of any contributory negligence.

Appellee was sitting with her father in the rear seat of the automobile and was holding her baby at the time of the collission. As a result of the impact appellee in endeavoring to hold her child was either thrown or fell from her seat and sustained injuries, for which this suit is brought.

It is first contended by plaintiff in error and appellant that the verdict of the jury is against the manifest weight of the evidence, it being the contention of counsel for plaintiff in error that notwithstanding the car in question left the track and notwithstanding there is no evidence tending to show contributory negligence on the part of appellee, that still the evidence fails to show a right of recovery.

We are of the opinion and hold that the evidence in the record warrants appellee in invoking the doctrine of res ipsa loquitur and that a right of recovery follows the happening of the condition shown in the record.

Chicago Union Traction Co. v. Giese, 229 Ill. 260.

Delong v. Chicago Railway Co., 187 Ill. App. 432.

In Chicago Union Traction Co. v. Giese, supra, the court at page 263 says: "When a thing which has caused an injury is shown to be under the management of the party charged with negligence, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, and the accident itself affords reasonable evidence, in the absence of an explanation by the party charged that it arose from the want of proper care. This rule of law results from the maxim res ipsa loquitur. Many cases are to be found illustrating the application of this rule. In some of them it is said that the rule is an exception to the general rule that negligence will never be inferred, while in others it is not treated as an exception but is treated as an evidentiary rule, under which the charge of negligence is regarded as proven, prima facie, by proof of facts showing that the thing which caused the injury was under the management and control of the defendant or his servants, and that the accident is such as in the ordinary course of things does not happen if those who have the management use proper care. (Webb's Pollock on Torts, p. 550.) The more accurate statement of the law is that negligence is never presumed, but that the circumstances surrounding a case where the maxim res ipsa loquitur applies amount to evidence from which the fact of negligence may be found."

We hold, therefore, that the verdict of the jury is not against the manifest weight of the evidence and that the record discloses in appellee a right to a recovery both against appellant and against plaintiff in error.

On the part of counsel for appellant, it is contended that the court erred in refusing to allow appellant to offer testimony as to the condition of plaintiff in error's track. While

the court may have limited the testimony of appellant somewhat more than should have been done, at the same time appellant was allowed to show in the main the condition of said track and we hold there was no substantial error committed by the court in its ruling on the evidence.

It is also contended by counsel for plaintiff in error that the evidence fails to show that the car in question was caused to leave the track by reason of defective rails as charged in the second count of appellee's declaration. The evidence in the record tends to show that there was a piece out of the right rail of plaintiff in error's track about where the car in question left the same. There is also evidence in the record tending to show a defective or loose joint at or near where said car left the track and there was other evidence in the record tending to show that the rails on plaintiff in error's track were more or less defective. While the evidence in that regard did not tend to show a very serious condition in that respect, nevertheless, we hold it was sufficient to go to the jury on appellee's second count of the declaration.

As we have held, that the doctrine of res ipsa loquitur would apply in this case, the assignment of error in regard to the condition of plaintiff in error's track is not very important for the law is that where negligence is shown in the operation of a car by a lessee resulting in an injury to a person in the exercise of due care both the lessor and the lessee are liable.

C. & E. I. R. R. Co. vs. Meech, 163 Ill. 305-308.

Anderson vs. West Chicago St. R. R. Co., 200 Ill. 329-332.

C. & G. T. Ry. Co. vs. Hart, 209 Ill. 414-416.

C. & E. I. R. R. Co. vs. Schmitz, 211 Ill. 446-458.

Delong & Chicago City Ry. Co., 187 App. 432.

In C. & E. I. R. R. Co., vs. Schmitz, supra, the court at page 458 says: "It is well settled that, 'When injury results from the negligence or unlawful operation of the railroad, whether by the corporation to which the franchise is granted or by another corporation, or by individuals whom the owner authorizes or permits to use its tracks, the company owning the railway and franchise will be liable.' (Pennsylvania Co. v. Ellett, 132 Ill. 654; Chicago and Erie Railroad Co. v. Meech, 163 id., 305; West Chicago Street Railroad Co. v. Horne, 197 id. 250. In West Chicago Street Railroad Co. v. Horne, supra, it was held that when an injury results from the negligent operation of a railway, whether by the corporation to which the franchise is granted or its lessee both the lessor and the lessee are liable to respond in damages."

We hold therefore that a liability is shown in this case against both plaintiff in error and appellant company. It is next contended that the verdict of the jury is excessive.

Plaintiff in error insists that a substantial remitturer should be required or that the judgment should be reversed and the cause remanded; while appellant contends that the remitturer will not cure the verdict and that a new trial should be granted by reason thereof. The record discloses that at the time the car struck the automobile in which appellee was riding, she attempted to protect her baby and in doing so was thrown or fell in the car and received an injury to her back, hips and right ankle, and also sustained a shock to her nervous system. The physicians who examined her, however, found

no bruises or abrasions of the skin and no objective symptoms except that in palpitating plaintiff's back they found a sensitiveness or tenderness in the lower spinal region and on her right hip and right ankle. The phyicians further testified that appellee complained of not being able to sleep and of suffering pain and of a nervous condition that rendered her unable to perform her household duties; one of the physicians testified that he was not able to state whether her nervous condition was permanent or whether she might in the years to come recover, but stated that if she ever fully recovered, it would not be for a considerable time. The trial of this case took place something over two and one-half years after the accident and the evidence is that while appellee's condition is improved, she is still very nervous and unable to perform her household duties.

The question of the amount of damages in a case of this character is hard to be estimated and is largely a question for the jury to determine, and unless the verdict of the jury is manifestly excessive, courts are not inclined to require a remitturer or to reverse the judgment on that account. In this case, however, notwithstanding the amount of damages to be allowed for injuries in order to compensate the person injured would have to be much largr now than they were a few years ago, we are of the opinion that on the evidence in this record, the same being largely of a subjective character, the verdict is excessive and the judgment must be reversed for that reason, unless a remitturer is entered.

P. C. C. C. & St. L. Ry. Co. vs. Story, 63 App. 239.

Chicago City Ry. Co. vs. McCaughna, 177 App. 538.

Chicago City Ry. Co. vs. Carroll, 102 App. 202.

Chicago City R. R. Co. vs. Anderson, 182 Ill. 298.

If within twenty days from the filing of this opinion appellee enters a remitturer of seventeen hundred fifty ($1750.00) Dollars, reducing the verdict and judgment to Six Thousand ($6,000.00) the judgment will be affirmed; otherwise the judgment will be reversed and the cause remanded.

Not to be reported in full.

Term No. 64. Agenda No. 17.

IN THE APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

October ~~FEBRUARY~~ TERM, A. D. 1921

ROAD DISTRICT NO. SIX (6) in Johnson Count, in the State of Illinois,

Appellant.

vs.

T. H. McKINNEY,

Appellee.

Appeal from Circuit Court of Johnson County.

Opinion by Boggs, J.

A complaint was filed by William Bridges, in the name of appellant, Road District No. 6 in Johnson County, in the State of Illinois, before a Justice of the Peace of said County, charging appellee with a violation of Section 151 of the Road and Bridge Act. Said complaint alleges that appellee "on or about the 1st day of April, A. D. 1919, at the County of Johnson and State of Illinois did unlawfully obstruct and encroach upon a certain highway or public road by putting brush in said road and by putting a wire fence and gates across said public road and by ploughing said public road or highway leading from the farms of William Bridges and the farm at that time owned by John Ford, to the Vienna and Berea public road, said obstructions, fence, wire and gates being put in and across said public highway at a point where said road runs and extends across and upon the south half of Section 16, Town 13 South, Range 3 East of the Third P. M. in Johnson County, State of Illinois, and that the said fence and gates and wires were and are still unlawfully in and upon and across said public road."

William Bridges is the owner of two tracts of land which are separated by a bluff which runs in a northerly and southerly direction between his upper and lower farm. His residence is on the upper farm, which lies along and back from the top of the bluff, and his bottom farm lies south and west of his upper farm and at the bottom of this bluff..

The record discloses that the alleged road which appellant claims was obstructed passes through land owned by said Bridges and land owned by one Whitaker then along the base of said bluff, rounding around the same in a northwesterly direction. A west branch of said road passes under a trestle of the Big Four railroad and connects with the public road to Vienna. Another branch of the road passed up to the top of the bluff through land owned by one Carter; then along the top of the bluff in a southeasterly direction through

land owned by appellee, than across a strip of land owned by said Whitaker.

The evidence on the part of appellant tends to show that the only way Bridges had of reaching his lower farm from his house is by passing northerly through a tract of land known as the Whitaker land and then along the top of the bluff through appellee's land to a point where the road turns toward the west down the bluff and then in a southerly direction along the base of the bluff, between it and a creek through appellee's and Whitaker's bottom lands.

It is first contended by appellant for a reversal of said judgment that the court erred in its rulings on the evidence. It being the contention of appellant that the court erroneously sustained objections to questions tending to show that appellee had stated to certain of the witnesses who testified on behallf of appellant that the road in question was a public road. While the court did sustain objections to certain questions of that character, at the same time the court permitted several of the witnesses on the part of appellant to testify that appellee had referred to the road in question as a public or permanent road thereby obviating the error, if any, complained of.

It is also contended that the court erred in refusing certain other testimony in chief with reference to the alleged road; that error, if any, was cured by the court admitting said evidence to go to the jury on rebuttal. There was therefore, no substantial error in the ruling of the court on the evidence.

It is next contended by appellant that the court erred in the giving of the sixth, seventh and eighth instructions given on behalf of appellee. We have examined these instructions and while they are not as accurately drawn as they should be, we are of the opinion and so hold that on this record the giving of said instructions do not constitute reversible error. There is no contention in this record that the alleged road in question was ever dedicated to the public but it is claimed that said alleged road has been established by prescription. In order to establish a public highway by prescription over unenclosed lands there must be something more than mere travel over it by the public. It must appear that the user is under claim of right in the public and not by mere acquiescence on the part of the owner. Town of Brushy Mound v. McClintock, 150 Ill. 129; Stewart v. Andrews, 239 Ill. 186; Hansen v. Green, 275 Ill. 226; Doss v. Bunyan, 262 Ill. 101; Palmer vs. City of Chicago, 248 Ill. 201-211.

In Town of Bushy Mound v. McClintock, supra, the court at page 133 says: "It is well understood that the user of private property, to ripen into a prescriptive right, must be adverse to the owner. Mere permissive use is never sufficient. 'It must also be open, adverse and under claim of right.' (Gentlemen v. Soule, 32 Ill. 279.)"

In Stewart v. Andrews, 239 Ill., the court at page 191 says: "In Rose v. City of Farmington, 196 Ill. 226, on page 227, it was said: 'In order to establish a way by prescription the use and enjoyment of what is claimed must have been continued for a long period, to-wit, twenty years. It must have been adverse, under a claim of right, exclusive, continuous, uninterrupted, and with the knowledge and acquiescence of the owner of the land in or over which the easement is claimed. The adverse use which will give title by prescription, to an ease-

ment is substantially the same in quality and characteristics as th eadverse possession which will give title to the land in fee. (Washburn on Easements, 131; 19 Am. & Eng. Ency. of Law, 11; City of Chicago v. Chicago, Rock Island and Pacific Railway Co., 152 Ill. 561.)"

The evidence in the record tends to the effect that whatever use was made of this alleged roadway it was a permissive and not an adverse use. The land owners on the top of the bluff would use it to reach their lands in the bottoms and occasionally other persons would go over said road. There are numerous gates or bars across this road as it runs on top of the bluff and down on the bottom lands in addition to the obstruction complained of. The evidence is to the effect that said land owners would sometimes plow up said roadway and farm the same. Bridges himself testified: "It must have been 14 or 15 years ago I plowed across the road and he (appellee) came down and said he would prosecute me * * * I never plowed out the road any more."

The record also discloses that in places the road has been changed from thirty to forty feet in order to pass around mud holes. It is not claimed the highway commissioners had ever worked the road or in any way exercised any authority over it. Appellee's father formerly owned the land now owned by appellee Bridges and Whitaker and on his death, which occurred about 23 years ago, the farm was divided among his three sons and they fenced the land and subsequent owners of said lands have made use of this passageway. Before the land was fenced the land in the bottom was in timber and part of it was unenclosed.

There is no contention made by appellant that the verdict is against the weight of the evidence, and in our judgment the clear preponderance of the evidence supports the verdict.

It is next contended by appellant that the general verdict is inconsistent with the answers made by the jury to the special interrogatories submitted to them. Five special interrogatories were submitted to the jury and said interrogatories and answers thereto are as follows:

1. Was the road alleged to have been obstructed, at the time of the alleged obstruction a public highway? Answer, No.

2. Did the road in question lead from the farms of William Bridges and the farm, at the time of the alleged obstruction owned by John Ford to the Vienna and Berea public road? Answer, No.

3. Was the use of the passway originally by the permission of the owner of the land? Answer, Yes.

4. Did the said use of said passway become adverse to said owner more than fifteen years before the date of the alleged obstruction? Answer, Yes.

5. Was the location of the alleged highway materially changed at the point of alleged obstruction within the last fifteen years before the alleged obstruction? Answer, No.

The answers to the first, second and third interrogatories are entirely consistent with and support the general verdict. While the answers to the fourth and fifth are somewhat inconsistent with the general verdict, at the same time, taken in connection with the answers to the first, second and third interrogatories, there is no substantial inconsistency shown.

At any rate, there is nothing in the special interrogatories that would warrant the court in reversing this judgment.

Lastly it is contended by appellant that the court erred in adjudging costs against William Bridges. William Bridges is not a party to this appeal and is not here compaining and we are of the opinion and so hold that appellant is not in a position to urge this assignment of error in William Bridges' behalf.

In Gibler v. City of Mattoon, 167 Ill. 18, the court at page 22 says: "We cannot reverse a judgment at the instance of one, who so far as we can see, has no interest in the matter whatever." We are not, however, prepared to say that the adjudging of costs against William Bridges at the trial court was erroneous. The second proviso of Section 155 of Chapter 121 of Hurd's Revised Statutes is as follows: "Said person shall before bringing suit in the name of the town or district give bond for costs as is provided for in cases of non-residents." Bridges gave bond to secure the costs in compliance with the provision of this statute and in the complaint filed by him it is recited as follows: "W. M. Bridges who prosecutes in this behalf in the name and by authority of Road District No. 6 in said Vienna Township, Johnson County, State of Illinois, etc."

The record therefore discloses that Mr. Bridges so far as he was able was fathering this suit and there was no reason why the costs should not be adjudged against him on a failure to maintain the same.

It is insisted by appellee that appellant wholly failed to make the necessary formal proofs with reference to the location of the road within said road district No. 6, and also with reference to the location of the alleged obstructions and that the court for that reason was right in refusing to grant a new trial. There is considerable merit in appellee's contention, especially in view of the fact that in order to warrant a verdict of guilty in this character of case the proof must be by a clear preponderance of the evidence. Town of Lewistown vs. Proctor, 27 Ill. 414; Ruth vs. City of Abingdon, 80 Ill. 418; Palmer vs. People, 109 App. 269. We have, however, considered this case on the merits and hold that the judgment rendered by the trial court was right and should be affirmed.

Finding no reversible error in the record, the judgment of the trial court will be affirmed.

Judgment Affirmed.

Not to be reported in full.